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Editors' Note

The role of the courts in Canada's political system is a long simmering issue in this country. Ever since the Charter of Rights and Freedoms came into effect in 1982, Canada's courts have been empowered to strike down provincial and federal legislation held to contravene Canadians' basic rights. Any number of court rulings since that time have caused a stir in legal and political circles. But in the past couple of years, judicial decisions seem to have attracted the attention of a broader public. Landmark rulings on a range of controversial issues, from aboriginal land claims to gay rights, have captured the headlines and catalyzed public debate about the merits of judicial power.

For some, the democratic legitimacy of post-1982 judicial activity is highly questionable. Should judges — who are neither elected to their posts nor easily held accountable for their judgments — really be invested with the power to strike down decisions of elected bodies? For others, the enforcement of rights by a powerful judiciary is an important check on headstrong governments and a long overdue development in a country witness to its fair share of discrimination and unfair treatment.

Like most vigorous and extended debates, the controversy surrounding Canada's courts has yet to be resolved precisely because there are cogent arguments to be made on both sides of the issue. If the protection of minorities against willful majorities seems an appealing idea in the abstract, many find their faith in the judiciary tested when faced with rulings like the striking down of a BC law forbidding possession of child pornography earlier this year. Similarly, confidence in the capacity and resolve of governments to treat all citizens fairly may be undermined by actions such as the attempt in Alberta last year to deny persons sterilized against their will the right to seek compensation through the courts.

While such controversies spark strong emotional reactions in many, it is our hope to keep the debate on a more even keel. The purpose of our series on judicial power is first and foremost to provide detached research that will help inform the public debate on this issue. To that end, most papers in this series are in an empirical vein, including the first two presented in this issue of *Choices*.

But if there is a normative tilt guiding the editors, it is towards the middle: wholesale change of the sort advocated by vocal critics of the courts seems unlikely and undesirable, but modest reforms might help preserve public confidence in our political and judicial institutions, while still ensuring Charter rights are properly observed. Some observers have suggested, for example, that courts and legislatures can and should engage in a more fruitful dialogue, with each branch of government showing respect for the other's viewpoint and exercising due circumspection in its decision making. Others have argued that if judges were appointed through a more transparent and accountable process, they would be more responsive to public sentiment and there would be less controversy about their role. Canadians should probably take a serious look at the merits and shortcomings of proposed reforms designed to effect such changes.

This is, however, not a unanimous ruling. Among our contributors there are dissenters whose distinctive viewpoints are apparent in their essays. Frederick Vaughan, of the Department of Political Science at the University of Guelph, begins our series with an introductory paper summarizing the political role of the Supreme Court from Confederation down to the present day. He has previously produced a book-length treatment of this subject; here he highlights some of the most salient developments. Vaughan reminds us, for example, that the push for a bill of rights in Canada began after

the Second World War when there was considerable concern in many quarters about atrocities committed elsewhere and misdeeds at home. Even at that time, however, there was not universal support for the project and a long struggle ensued to establish a Charter of Rights with teeth in 1982.

Professor Vaughan pays special attention to events since 1982. In examining the reasoning underlying certain key Supreme Court decisions, he finds that the justices have enjoyed considerable discretion in applying the Charter and have tended to use this to activist ends. At the same time, he notes that politicians have also been guilty of dragging judges into political debates. The reference case procedure has sometimes been used by political leaders to attain objectives that could not be achieved through legislative means. And it should not be forgotten that the establishment of a Charter of Rights, which opened the door to an activist judiciary, was an act of politicians not judges.

Our second paper, by Kate Malleson of the Department of Law at the London School of Economics, introduces a comparative perspective to the Canadian debate about the role of the judiciary. Too often, we fail to take note of important developments elsewhere that shed light on our own situation. And if we do cast our gaze further afield, it often falls just a stone's throw to the south, where lessons are drawn, often negative, from the American experience with a strong, politicized judiciary and a highly litigious society.

But there are other places to consider, for the rise of judicial power in Canada is part of a global trend that has swept many countries in the past two decades. Among these is Great Britain, the country often held up by Canadian critics of the courts as evidence that a sovereign Parliament, unfettered by judicial checks, can effectively uphold and respect basic human rights. But even in the home of parliamentary sovereignty changes are underway. As Dr. Malleson relates in her paper, the Labour government has just assigned British judges a new role that will almost certainly enhance their power in the coming years. In November of last year, a bill was passed that incorporated the European Convention on Human Rights into British law. Starting in the year 2000, British judges will be called on to determine whether British legislation conforms with a domestic bill of rights. But with a twist: British judges will not strike down laws as in Canada. Instead, if a law contravenes the Convention, judges will make a "declaration of incompatibility." The government will then be expected, though not required, to take the law back to Parliament for amendment. As the British experience with this new system unfolds, Canadians should pay close attention to see how this interesting variation on the practice of judicial review affects public perceptions of judges, legislatures and rights claims.

Later papers planned for this *Choices* series will examine other important facets of judicial power. One paper will turn attention away from the courts to consider the impact of the Charter of Rights on parliamentary deliberation and bureaucratic policy-making: what role do the legislative and executive branches play in defining and upholding rights? Another will analyze interest group litigation before Canada's courts: who litigates and why? Results of a national survey will shed light on the state of Canadian public opinion on the courts and the Charter of Rights. And judicial appointment procedures in Canada will be compared to those used in other countries to determine whether any reforms might be in order.

Interested readers should also consult the April issue of the IRPP's *Policy Options*, which carries several shorter pieces by some of Canada's foremost commentators on the courts. Both critics and friends of the courts speak out on various aspects of judicial power, including Rainer Knopff, Lorraine Weinrib, Bertha Wilson and Peter Hogg. They offer much provocative and insightful commentary on the ongoing debate on Canada's courts.

Judicial Politics in Canada: Patterns and Trends

Frederick Vaughan

Introduction

In recent years Canadians have begun to hear dark warnings from editorial writers and academics about judges overreaching their authority. The Supreme Court of Canada, it is said, has become an "activist Court," especially since the adoption of the Canadian Charter of Rights and Freedoms in 1982. Indeed, it seems that hardly a day goes by without some comment or criticism to the effect that under the Charter courts are usurping the role of the legislatures. Rather than enunciating what the law is, the critics contend, the Supreme Court has begun to make law.[1] Some judges have overstepped their proper role, these writers say, by redefining (among other things) the nature of the family to include same-sex relationships and by striking down the Criminal Code regulations on abortion. The call to restrain judges from engaging in this kind of judicial activism has begun to reach a chorus. The Reform Party has been especially quick to respond to this chorus and has called for the establishment of a parliamentary committee to "review decisions of the Supreme Court and advise the House when any decision appears to violate the purpose for which Parliament passed legislation or the original intent of the Charter of Rights and Freedoms." In addition this

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parliamentary committee would "advise Parliament whether any legislative action is necessary, including the use of the notwithstanding clause, to restore the legislation or the application of the Charter to its original intent." Such a committee would also vet candidates for the Supreme Court in terms of their "qualifications and judicial philosophy."[2]

The purpose of this paper is to present a descriptive account of judicial politics in Canada and to assess whether our courts, especially the Supreme Court of Canada, have become as activist as the critics suggest. Have our judges begun to impose their own values, through their interpretation of the law, in defiance of the will of the legislators who make the laws? This question has become critical since 1982 when the courts were handed the Charter of Rights and Freedoms which gave them a new and wider mandate in areas touching directly controversial matters of public policy. The Constitution Act, 1982 obliges our judges to become more activist than previously. But have they gone too far in interposing their own private perceptions in contentious areas of public policy? I shall attempt to answer this question by, first, reviewing the role the courts have played throughout our history, as well as the events that led to the adoption in 1982 of the Canadian Charter of Rights and Freedoms. Second, I shall review the trends that have emerged since 1982 in several areas of public policy where the Supreme Court has rendered controversial judgments in applying the Charter to contemporary events.

The Courts and the Constitution of 1867

What has come to be called "judicial activism" is little more than the sharp edge of what is known as "judicial review," i.e., the act by which judges assess the validity of legislation or government regulations. The term "judicial review" is American in origin and the practice has been, until recently, predominantly an American one. The judiciary under the American Constitution has assumed, since late in the nineteenth century, an expansive interpretation of the Bill of Rights and, hence, has generally been in the forefront of contentious public policy issues. But the history of the American practice of judicial review comes down to us steeped in controversy. It would be difficult to imagine Chief Justice John Marshall, the great defender of judicial review, party to such modern decisions as *Brown v. Board of Education* (1954), which set the contemporary court on the fast track to judicial supremacy.[3] The Supreme Court of Chief Justice Earl Warren and its reliance on "sociological jurisprudence" would never have appealed to Marshall. There has been a growing concern throughout the literature on the courts in the United States that judges have begun to usurp the role properly belonging to the legislators.[4]

Judges in Britain, by contrast with their American counterparts, have been by tradition more deferential to the will of Parliament. There are in fact no grounds (until the most recent legislation incorporating the European Convention on Human Rights into British domestic law) for British courts to declare acts of Parliament unconstitutional or *ultra vires*. But this does not mean that British judges have been obliged to sit mute in the face of injustice. For the great Blackstone clearly enunciated the ancient rules of equity which oblige the judge to make up for defects of the law's application in specific cases; since laws by definition must be universal and expressed in general language, Blackstone noted, there runs the likelihood that a given law will be applied unjustly if not trimmed to suit the specific circumstances. But even here Blackstone cautioned restraint:

> The liberty of considering all cases in an equitable light must not be indulged too far, lest

> thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.[5]

The Canadian courts have tended to follow the British tradition of restraint or deference. But because of the federal nature of Canada's constitution, with spheres of legislative jurisdiction divided between the two levels of government, our courts have always been more directly involved in the politics of the country than British courts. And there can be no disputing the fact that the Judicial Committee of the Privy Council (Canada's final court of appeal until 1949), played an "activist" role in re-ordering the terms of the Canadian constitution. Through a series of binding decisions, the Judicial Committee restricted the authority of Parliament to legislate for the "peace, order and good government of Canada," to matters of "emergency" or "national importance." At the same time it expanded the powers of the provinces to legislate in matters relating to "property and civil rights" and restricted the federal authority over "trade and commerce." To no one's surprise, the serious re-ordering of the terms of the Constitution Act, 1867, undertaken by the Judicial Committee, met with a mixture of approval and disapproval in many quarters throughout Canada, especially from those who thought that "Macdonald's constitution" was being eviscerated.[6] As W. P. M. Kennedy observed in the 1930s, the Judicial Committee refused to see in the British North America Act, 1867, "anything of a constitutional nature or to be guided by its historical origins...They have applied to it arbitrary rules of construction which have at times robbed it of its historical context and divorced its meaning from the intention of those who in truth framed it."[7] Very few commentators today subscribe to Kennedy's assessment of the work of the Judicial Committee. For however questionable some of the Judicial Committee judgments have appeared to certain observers, it would be difficult to imagine Canada today being governed by a powerful Parliament armed with the authority to ride roughshod over the wishes of provincial legislatures. There can be no question, however, that it was the "judicial activism" of the Judicial Committee that re-ordered the terms of the Constitution Act, 1867, and gave our constitution a more genuinely federal character. In this sense, the courts, especially the Judicial Committee of the Privy Council, have been active in determining the scope and powers of our constitution from the very earliest years.

It is important to note that the criticisms directed at the Judicial Committee rarely challenged the right of that body to exercise judicial authority over cases arising under the terms of the Constitution Act, 1867. Indeed, the path Canada has followed from the very beginning, like almost every other federal state, has been to resolve disputes over jurisdiction through judicial review.[8] But as Canada emerged out of the shadows of the old colonial order, it was not long before voices were heard calling for a termination of appeals to the Judicial Committee. Those calls, however, were never to abandon the use of the courts as instruments of constitutional adjudication. Rather, they were to allow our own Canadian courts, especially the Supreme Court of Canada (established in 1875), to become the final court of appeal in all matters affecting Canadian disputes. These voices fell on deaf ears until the Judicial Committee ruled as *ultra vires* certain acts of the national parliament that were designed to lift the country out of the Great Depression. This proved to all, even to some of the most inveterate JCPC supporters, that Canadian courts comprised of Canadian judges with knowledge of Canadian problems must have the final say in important constitutional matters. As Howard

McConnell has written: "After most of the New Deal statutes were invalidated by the Privy Council, the controversy passed from the judicial to the political forum and Canadians were confronted starkly with the question of whether they should – or could – establish an ultimate court of appeal in Canada."[9]

The Court and Advisory Opinions

One of the great ironies of the Canadian debate over the role to be played by the courts of law in the constitutional life of the country is the fact that from the very earliest years there was the clear provision that the Governor in Council (the federal Cabinet) could refer virtually any matter to the Supreme Court for an "advisory opinion." Under rule 53 of the Supreme Court Act, the Supreme Court is required to answer all questions asked by the Governor in Council "as in the case of a judgment upon an appeal to the Court." The Court is granted "special jurisdiction" under this provision covering "important questions of law or fact" over a wide range of issues. This practice, known as the reference procedure, has been used many times from the earliest days up to and including the present government of Jean Chrétien. Indeed, between 1867 and 1966, 35 percent of all constitutional cases heard by the Supreme Court or the Judicial Committee were reference cases; between 1967 and 1986 the number dropped to 15 percent.[10]

The practice of referring cases to the courts for advisory opinions is not new in Anglo-Saxon jurisprudence. As Huffman and Seathoff have shown, there was a long history in English judicial practice of sending questions to the courts for their view.[11] Indeed, the Judicial Committee Act, 1833, specifically provided for such opinions.[12] However, the practice of referring questions to the Supreme Court of Canada was initially resisted, especially by the provinces. These concerns later abated partly because the provinces established their own reference procedures. A provincial government can refer a question – which can involve either federal or provincial legislation – to its own provincial court of appeal and appeal that judgment to the Supreme Court of Canada.

Given the provinces' early concerns, the matter was not finally resolved in favour of the practice until the Judicial Committee ruling in *Reference Appeal*[13] in 1912. Since that date it has, by and large, won the approval of constitutional commentators. As Peter Hogg has commented, "the reference procedure enables an early resolution of the constitutional doubt" on important occasions.[14] Hogg's only regret is that "the Court has not made sufficient use of its discretion not to answer a question posed on a reference."

By contrast with the United States, where the Supreme Court is restricted to considering actual cases arising under the Constitution,[15] our courts are virtually dragged into the political fray by the reference procedure. And, what is more, there appears to be no way the Court can refuse to hear reference cases, though, as Hogg has noted, it does have a measure of discretion to reject questions that are overtly political. The full Court must answer the questions put to it and do so expeditiously.

There can be little doubt that on most occasions reference cases have been very useful. But in a few notable cases they have been used to get our parliamentarians out of embarrassing or difficult positions, as we see briefly in several instances. The Criminal Law Amendment Act, 1968-69, contained the provision for a person accused of drunk driving to obtain a sample of his or her breath for purposes of self-defense. The Act stated that the accused was to be given a sample "in an approved container." This provision was intended to provide an accused person the means of obtaining independent analysis for purposes of self-defence. Unfortunately, the government of the day was unable to come up with

an "approved container," as prescribed by section 120. So when it promulgated the Act, the government simply deleted the provision requiring the police to provide the sample. Thus the final Act lacked the safeguard guaranteeing an accused the means of self-defense as intended by Parliament. Civil libertarians throughout the country poured scorn on Justice Minister John Turner. Turner responded by sending the case to the Supreme Court on reference. Turner asked the Court whether the government could promulgate the Act without the protection of section 120. This only aggravated the matter because there was a case in the courts of British Columbia challenging the breathalyzer law on the grounds that it violated the Canadian Bill of Rights. Turner did not ask the Court whether the failure to enact section 120 of the Act violated the Bill of Rights. Many Canadian civil libertarians thought that this failure was critical.

To the surprise of many Canadians the Supreme Court of Canada (which included the great civil libertarians Emmett Hall and Bora Laskin) ruled in favour of the Minister of Justice. The federal government has never, to this day, made an effort to find an "approved container." And thus Canadians accused of drunk driving remain without recourse to a sample by which they might defend themselves as Parliament had intended. Canadians can only guess what the outcome might have been had the British Columbia case been permitted to make its way to the Supreme Court and assessed on its merits under the Canadian Bill of Rights.

In 1980, the federal government under Prime Minister Pierre Trudeau was determined to bring about a constitutional amendment that, among other things, would permit Canadians to amend the British North America Act, 1867 without going to Westminster. And Trudeau made it clear that he was prepared to proceed unilaterally, without provincial approval. He was adamantly opposed by eight provincial governments. Three — Manitoba, Newfoundland and Quebec — referred the question of unilateral patriation to their courts of appeal. The results were mixed and confusing. All three appeals to the Supreme Court of Canada were consolidated into one. The Court rendered its judgment on September 28, 1981. It ruled that by going to Westminster without the unanimous consent of the provinces, the federal government would be acting legally but *unconstitutionally*, in the conventional sense. Armed with this decision, Trudeau reconvened the provincial premiers at a federal-provincial conference in November. The result of these new consultations was (over Quebec's opposition) the Constitution Act, 1982, complete with a Charter of Rights and Freedoms which armed our judges with new constitutionally entrenched powers to oversee legislation both federal and provincial.

And finally, in the 1998 reference to the Supreme Court on Quebec secession, the Court's decision served both to defuse a climate of constitutional uncertainty and to put a little order into ensuing discussions and debates concerning Quebec's right to secede from the federal union. In many respects, it was a model of how the reference procedure can work to defuse important, contentious constitutional disputes. The Canadian constitution says nothing about the right of a province to secede from the confederation. Hence a debate arose throughout the country concerning the Parti québécois government's plan to press ahead with secession after a favourable referendum vote. The Supreme Court ruled that the constitution did not allow a province to secede unilaterally, that is, "without principled negotiation with other participants in Confederation within the existing constitutional framework."[16] The Court further ruled that a vote favouring secession, "by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole."[17] At the same time, the Court noted that "A clear majority vote in Quebec on a

clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize."[18] As to what constituted a clear majority and a clear question and what form negotiations would take, the Court threw those matters back to the politicians.

Despite the muted dissatisfaction with the reference procedure that continues to emerge from time to time in the legal literature there is no indication that the Parliament of Canada is about to amend the Supreme Court Act in the near future to eliminate rule 53. All the evidence points to the continued use of this device especially in controversial constitutional matters. The Supreme Court showed in both the patriation and the Quebec secession references that it could serve a very useful function in controversial matters.

In sum, while Canadian courts in the past demonstrated a pattern of judicial deference to the will of the legislature, their role in division of powers and reference cases did offer some scope for an early judicial activism of sorts. Thus, the judiciary has always played an important role in the constitutional life of the country, though in the past it did so anonymously, and judges only rarely met with criticism. But the quiet and anonymous life of judging in Canada began to change with the introduction of the Bill of Rights in 1960 and, especially, with the adoption of the constitutional Charter of Rights and Freedoms in 1982.

The Aftermath of War and the Push for a Bill of Rights: 1945-1960

With the end of World War II there arose throughout the entire Western world a call for judicial enforcement of basic political and civil liberties. The Nuremberg trials of the principal Nazi criminals and the increasingly outrageous details of the Holocaust drove public sentiment in the direction of codes or bills of rights that national governments would judicially enforce.[19] This movement was encouraged by the adoption of the Universal Declaration of Human Rights in 1949 by the United Nations. Canada and Canadians were not immune from these international sentiments. Indeed, most Canadians were confident throughout the 1950s and 1960s that they were in the forefront of the movement to foster human rights. Many of the provinces responded within their own jurisdictions by adopting "human rights" codes. Some, such as Ontario, went so far as to undertake a formal judicial inquiry into the condition of human rights in the province.[20] It comes as a shock, therefore, to learn that the Canadian federal government under Louis St. Laurent and other ranking members of the federal Liberal Cabinet were deeply suspicious of statutory codes of rights and judicial enforcement. According to archival documents recently uncovered by William Schabas, of the Université du Québec à Montréal, "the real story was that there was a conscious strategy within the Canadian government to obstruct the universal declaration." Contrary to the official line that Canadians were fed by the Department of External Affairs, "the new documents show that the role Canada played was more subversive than supportive, with little if any regard for human rights in the External Affairs Department at the time."[21] Quebec Premier, Maurice Duplessis, was especially reluctant to sign on to a document guaranteeing freedom of speech and peaceful assembly, rights that ran the risk of threatening his province's determination to restrict the activities of groups such as the Jehovah's Witnesses. So the Department of External Affairs under Lester Pearson put it out that Canada's resistance to the Declaration in the draft stages arose out of concern over the invasion of provincial jurisdiction. Canada was finally cajoled into signing the final document once it was made clear that not to do so would place

Canada with those nations, like the Soviet Union, who had made "human rights" a dirty term. Canada's reluctance to become a signatory to the United Nations instrument guaranteeing basic human rights reveals the depth of suspicion that existed throughout the higher levels of the Canadian political and civil service establishment of the day, a suspicion that was to resurface later in attempts to secure a domestic bill of rights.

In the late 1940s, members of the Canadian bar began to urge the adoption of a constitutional charter of rights modeled on the United Nations Charter. This appeal was stimulated in no small way by such matters as the wartime handling of Japanese Canadians and concern over the National Emergency Transitional Powers Act of 1945, which declared that a condition of emergency still existed throughout Canada giving the federal Cabinet all the draconian powers it had under the War Measures Act. A furore erupted when it became clear that the government was prepared secretly to interrogate and detain citizens without access to the legal protections guaranteed by the common law.[22]

The concern for the rights and liberties of Canadians has remained an issue since that time. John G. Diefenbaker entered Parliament in 1945 with the promise to have Parliament enact a bill of rights preventing the infringement of basic civil rights. The debate in the law reviews and the public press reached a peak in the 1950s with three cases from Quebec involving freedom of speech, religious liberty and the right of peaceful assembly, the famous "Padlock cases."[23] In these cases, the Supreme Court wrestled nobly with the basic issues of civil liberties but appeared handicapped by the absence of clear statutory authority by which to strike down patently unacceptable government actions to restrict the rights of citizens. It was becoming evident by the late 1950s that a groundswell of support existed for a federal bill of rights. John Diefenbaker swept to power in the general elections of 1957 and 1958 with a promise to enact a such a bill.

The Canadian Bill of Rights: 1960 – 1982

Despite opposition within his own party, Diefenbaker's determination won out and on August 8, 1960 the Parliament of Canada unanimously adopted The Canadian Bill of Rights. The unanimous vote is often trotted out as confirmation of the depth of support for the Bill of Rights, but the record shows that suspicion or fear of a statutory bill of rights still lingered, for almost 60 members of Parliament absented themselves from the vote on third reading of the bill. They simply could not bring themselves to vote in favour of the document, but they feared for their reputations in voting against a bill supporting basic rights of citizens in a democracy.

The Diefenbaker Bill of Rights was a pale imitation of the bill desired by many Canadian civil libertarians, for it applied only to federal areas of jurisdiction. The provincial and municipal levels of government were formally excluded from the reach of the act, an important omission since many of the issues that fall under the category of political and civil liberties lie within provincial areas of jurisdiction. As well, the terms of the Bill of Rights were ambiguous and imprecise; they did not give the courts the explicit authority to strike down offending practices or legislation. The Act simply enjoined the courts of Canada to "construe and apply" offending legislation "so as not to offend the terms of the Act." All in all, the Bill was ridiculed by legal specialists as virtually useless.

And so it proved to be with one notable exception: the *Drybones* case of 1969.[24] In this case the Supreme Court of Canada for the first time struck down a provision of a federal statute – the Indian Act of 1947, which had made it an offence for a native person to be drunk off a reserve. The Court ruled that the provision offended the equality guarantees of the Canadian Bill of Rights. Canadian civil

libertarians celebrated this decision as the harbinger of things to come. But such was not to be the case. For the Supreme Court soon retreated into a more passive disposition and never used the Bill of Rights as effectively again. Indeed, the author of the *Drybones* decision, Chief Justice John Cartwright, formally repudiated the line of reasoning he had taken in that case in *Robertson and Rosetanni v The Queen*.[25] Thus, Canada's first efforts to extend judicial protection to basic civil liberties were less than impressive.

Growing dissatisfaction with the Supreme Court under the Bill of Rights fueled the call for a new one that would give our courts a clearer mandate to strike down acts of Parliament which were in violation of basic civil liberties. But there was another force, too frequently overlooked, moving Canadian public opinion toward more judicial protection of civil liberties. The central role being played by judges in the United States during the early years of the civil rights movement and the ensuing television coverage available to Canadians contributed in no small part toward public acceptance of a more directly involved judiciary. Lawyers and judges were seen as the white knights of the downtrodden. It was television through fictional and factual accounts of lawyers and judges championing the cause of civil liberties — from "Perry Mason" to court-ordered school integration — that prepared the Canadian public for an increased role for our judges. As well, operating at another level, was the influence of those academic lawyers who had pursued their graduate studies in the United States during the heyday of the civil rights movement. These teachers, returning to Canada, did much to sensitize future lawyers and judges to the benefits of judicial protection of basic rights and the virtues of a written constitutional bill of rights.

The Movement to Entrench The Charter

Pierre Trudeau, as Minister of Justice, seized the occasion with the promise to entrench a bill of rights, one that would not only cover the actions of the federal government but the provincial spheres of jurisdiction as well. Needless to say Trudeau's efforts to carry out this project over the next decade and a half were greeted with a flurry of controversy. Many in the press and in the academy came out with guns blazing. Those who opposed the Bill of Rights of 1960 rose to denounce Trudeau's efforts to entrench a bill of rights in the Constitution. But this time the Canadian Bar Association put its considerable weight behind entrenchment (previously, most members of the Association were unenthusiastic about involving the court in such matters).[26] As J.-G. Castel, editor of *The Canadian Bar Review* wrote soon after the adoption of the new constitution in 1982: "...in recent years, the federal government and many of those concerned with human rights, especially the Canadian Bar Association, came to the conclusion that the best way to protect basic rights and freedoms including minority rights was to entrench them in the Constitution."[27]

The public and academic debates over the Trudeau Charter of Rights predictably brought out all the arguments that greeted the Diefenbaker Bill of Rights two decades previous. The general thrust of the opponents was the same: a statutory bill of rights would increase the power of judges and would result in "judicial supremacy"; it would also infringe upon the duty of parliamentarians to be the champions of rights and freedoms. The old critics were more adamant than ever because they viewed the new Charter as a certain step in the direction of the "judicialization of politics" in Canada. There can be no mistake about it, the new Charter of Rights and Freedoms was a considerably

more powerful instrument than the old Bill of Rights, for the Charter was constitutionally entrenched, becoming a formal part of "the fundamental law of the land," and gave judges the power to declare offending acts and procedures "unconstitutional." As Mr. Justice Gerald La Forest wrote shortly after the adoption of the Charter, "[W]e really entered into a new stage of constitutional development when the Charter became law, a stage that will involve a new way of looking at law and the rights of the individual."[28] But La Forest did not believe that our judges would use the new Charter as actively as American judges have done. He was persuaded that they would be constrained both by the Canadian psyche and the inherited British tradition of restraint.

The essential differences between the Bill of Rights and the Charter of Rights and Freedoms cannot be over-emphasized; they are formidable and important. The latter gave the Court a much broader and powerful role in the protection of fundamental rights and freedoms. The first important difference between the two instruments is that the Charter is a formal part of the Constitution and can be amended only by the explicit amending formulas contained in the Constitution. As well, it extends to all governments, federal, provincial and municipal, unlike the Bill of Rights which covered only the federal area of jurisdiction. Furthermore, the terms and language of the Charter are stronger than the Bill of Rights and give judges a clearer mandate to strike down as unconstitutional acts of Parliament and legislatures and their agents, something they never had so explicitly before.

The Charter's judicial mandate, however, is formally circumscribed by two legislative "escape hatches": section 1 states that "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." And section 33 permits Parliament or a legislature to "expressly declare in an Act of Parliament or of the legislature...that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." It goes without saying that the courts have a role in determining whether any limits on rights under section 1 are "demonstrably justified." Indeed, the Court has already laid down the basic ground rules for section 1 adjudication. In *R v. Oakes*,[29] the Supreme Court set down a two-step test that governments must meet: The government must show that the exemption is justified by a "pressing and substantial" objective; and the legislative means chosen must be "proportional" to the objective. The "notwithstanding" clause, on the other hand, provides for no judicial scrutiny.

These "escape hatches," however, have not resulted in a deferential Court. Despite the fact that the Supreme Court has on occasion upheld the use of section 1, it has not, as we shall see, shied away from a vigorous application of the Charter. At the same time, the Parliament of Canada and the provincial legislatures have been generally reluctant to use the notwithstanding clause. Politicians at both levels of government tend to feel that the people at large do not want them to avail themselves of this provision too readily.

The Court and the New Mandate: 1982 – Present

The new mandate given to the Court in 1982, it must be remembered, was a major part of Trudeau's vision to unify Canadians around a distinctly Canadian concept of citizenship. In no small part this movement was designed to defuse the nationalist sentiment in Quebec by articulating a pan-Canadian national identity and by drawing the attention of all Canadians to a "higher" set of values. Americans had their Bill of Rights, now Canadians would have their

very own Charter of Rights and Freedoms. And all evidence points to the enthusiastic popular acceptance of the Charter. No matter how controversial some Charter decisions have been, there can be no question that Canadians have embraced the Charter. Clearly, the Charter has provided Canadians with an indigenous point of national coalescence.

But the Charter has also, of course, increased the power of the judiciary. By way of a brief statistical overview of Supreme Court decisions and a look at a few equality cases and legal rights cases, we shall see how aggressively the Court has begun to embrace its mandate under the Charter.

Statistical Trends Since 1982

As Peter Russell has pointed out, "Statistics about courts and judges can at best give only an indication of broad trends in the work of the courts and the inclinations of judges."[30] But such studies do help to show overall trends in the "success" or "failure" of the various items in the Charter, keeping in mind that a litigant's "failure" can be a "win" for the people at large, or *vice versa*. A statistical review of the "success rate" of Charter cases goes a long way to dispelling the notion that the Court has gotten out of hand since the Charter's introduction and needs to be reined in. For the statistics show that, despite an initial burst of activity in the early years, the Court has not been wielding the Charter as a broad sword.

When the Charter was adopted in 1982, some observers thought that it would transform the Supreme Court of Canada into a "Charter court"; that it would deflect the Court's attention away from its traditional role as referee of the Canadian federal system; that the Charter would unleash a flood of litigation so as to overwhelm the Court's docket. The annual statistics for the Supreme Court's docket from 1982 to 1992 show a different pattern: only 18 percent of the decisions rendered by the Court were Charter decisions. That number includes a low of zero percent for 1982 [when there were no Charter cases] through a high of 31 percent in 1990. All in all, looking back over the past 14 years of Supreme Court decisions, the Charter has accounted for just under 25 percent of the Court's work.[31] The most recent statistical study reveals a remarkable continuity in the Court's workload: "Actions of executive branch officers, mainly the police, rather then legislation continue to be the target of just under one-half of the Charter challenges coming before the Court."[32] This no doubt reflects, as Russell remarks, "the fact that two-thirds of Charter cases involve the legal rights sections of the Charter."[33] Overall, the success rate of 31 percent is higher in legal rights cases (Charter sections 7 to 14) than in fundamental freedoms (section 2) or equality rights (section 15) cases, where the success rates are 20 percent and 22 percent respectively. The overall success rate of Charter cases over the years from 1991 to 1997 is 31 percent.[34] The statistics also show another more or less consistent trend: "the four most frequently litigated Charter provisions at the Supreme Court level are section 7 (principles of fundamental justice), section 8 (search and seizure), section 10(b) (right to counsel), and section 11(d) (right to an independent and impartial tribunal)."[35]

Big M Drug Mart and "Purpose" and "Effect"

Despite the fact that quantitative analyses tend to show that the Court has been reasonably restrained in its Charter decisions, there can be no denying that in a number of cases it has been very active. But this should come as no surprise, for from the very beginning of the Charter's life the Supreme Court justices themselves understood that they were called upon to exercise a new and more active role in the life of the nation. In the very first Charter decision, Justice Estey observed that "with the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights."[36] And as Justice McLachlin said in an

address to law students several years later: "The Charter...has changed the life of judges dramatically."[37] She went on to say that "the Court will take an expansive approach to defining the rights and freedoms guaranteed by the Charter and will not hesitate to tackle substantive issues even where limiting their role to procedural concerns is a viable alternative."

On the bench, both Justice Bertha Wilson and Chief Justice Brian Dickson served notice in one of the early Charter cases — *Big M Drug Mart*[38] in 1985 — of exactly how the Court would look at matters raised under the new mandate. Big M Drug Mart challenged the federal Lord's Day Act which prevented the company from opening its stores for business on Sundays. Big M Drug Mart argued that it was being forced by the statute to close on a designated Christian day of worship and that this violated the "the right to be free from conforming to religious dogma,"[39] guaranteed by the Canadian Charter of Rights and Freedoms. Chief Justice Dickson in a majority judgment ruled, after a lengthy review of Lord's Day Acts or their equivalent, to strike down the federal statute.[40] In doing so, he noted that the Charter would be interpreted with a view to evaluating an impugned statute in terms of its *purpose* and *effect*. "Either an unconstitutional purpose or an unconstitutional effect can invalidate legislation," he explained.[41] Justice Wilson picked up on this and elaborated: "In my view, the constitutional entrenchment of civil liberties in the Canadian Charter of Rights and Freedoms necessarily changes the analytic approach the courts must adopt in such cases....While it remains perfectly valid to evaluate the purpose underlying a particular enactment in order to determine whether the legislature has acted within its constitutional authority in division of powers terms, the Charter demands evaluation of the impingement of even *intra vires* legislation on the fundamental rights and freedoms of the individual." She concluded that "placing the analytic focus on the effect of legislation impugned under the Charter rather than on its purpose will impose a less heavy evidentiary burden on the plaintiff. Once the plaintiff can point to an actual or potential impingement on a protected right, it will not matter that the underlying legislative purpose is subject to conjecture. In this case at bar the effect of the Lord's Day Act is to compel adherence to the Christian Sabbath by requiring the uniform observance of the day chosen by the Christian religion as a day of rest. It is this effect which infringes upon the freedom of conscience and religion guaranteed by the Charter."[42]

Equality and the Charter

One of the most important cases decided by the Supreme Court under the Charter, which had wide implications for public policy and which caused considerable public reaction, was the *Morgentaler (1988)* case.[43] The Court majority led by Chief Justice Dickson and Madame Justice Wilson agreed that the Criminal Code provisions restricting access to abortion to therapeutic abortion committees of hospitals violated a woman's right to security of the person. The Court ruled on procedural grounds and explicitly invited the Parliament of Canada to come up with a more equitable law. The effect of *Morgentaler* was to make Canada the only western nation not to have laws governing abortion.

The purpose of the Supreme Court's judgment in *Morgentaler* was clearly to return the issue of the regulation of abortion to Parliament to rewrite the legislation. Parliament attempted to do so in 1991, but the Criminal Code amendment which passed the House of Commons was defeated in the Senate on a tie vote. Thus, the failure to provide regulations governing abortion procedures cannot be laid, in the final analysis, at the door of the Court; Parliament has failed to act to correct the mistakes of the impugned legislation. In this instance, at least, it would appear that the "activism" of the Court simply reflects Parliament's willingness to sometimes

let the Supreme Court make difficult public policy decisions.

If one looks, however, at Charter section 15 cases, such as equality between the sexes, gay rights, and so forth, one begins to see a pattern if not exactly a trend. In the first instance, the Parliament of Canada deliberately left out sexual orientation from the enumerated items protected by the Charter. The Supreme Court, however, in *Egan v. Canada* read homosexuality into the Charter's "equal benefit of the law" provision on the grounds that "sexual orientation...falls within the ambit of section 15 protection as being analogous to the enumerated grounds."[44] And very recently the same Court overturned the Alberta appeal court decision and read homosexuality into the Alberta Individual Rights Protection Act despite the fact that on two distinct occasions the Alberta legislature, after debating the matter at length, formally voted to exclude homosexuality from the reach of the IRPA. What was especially notable about the *Vriend* decision was the fact that the Supreme Court ruled that a legislative *omission* bears judicial disapproval on the same basis as the legislature's positive acts. In other words, according to the Court, the legislature can offend the Charter by failing to do something just as much as it can offend the Charter by an explicit act of legislation. The Supreme Court majority led by Justices Cory and Iacobucci argued that by excluding sexual orientation from the IRPA, the Alberta legislature sent a message to the community that it was acceptable to discriminate against people on the grounds of sexual orientation. Nor, said the Court, was the breach of section 15(1) of the Charter saved by the "reasonable grounds" provision of section 1. As a remedy, the Court ordered that sexual orientation be "read into" the IRPA. But this was not the only time that the Supreme Court has ruled on the failure of a public body to act. In *Eldridge v. British Columbia*, the Court held unanimously that the failure to provide sign language interpretation for deaf patients violated the equality provisions of the Charter. In cases where an identifiable group claims unequal treatment, gays and deaf people in these two instances, the Supreme Court has shown a tendency to use the Charter as an instrument to correct the matter.

It is interesting to note in connection with the *Vriend* decision that when Alberta Premier Ralph Klein mused publicly that he might invoke the "notwithstanding" clause of the Charter, he quickly withdrew his threat when the public proved to be unsupportive. The negative reaction by the people of Alberta to the use of the notwithstanding clause seems to point to a general reluctance of the public to support the use of the override provision of the Charter. Recent calls by the Reform Party for the federal government to use the notwithstanding clause to overturn a British Columbia court decision involving the possession of child pornography were likewise met with mixed reaction, if not outright public disapproval. Something is clearly happening in public opinion in this matter: there seems to be some concern about judicial activism, while at the same time there is a general reluctance to see governments move in too quickly to curb court activists by way of the notwithstanding clause.[45]

Those skeptical of the new role of the courts since 1982 perhaps realize that judges are not wholly to blame. When one looks at the Charter mandate given to the courts, what can one expect but that judges would interpret their mandate in a generous or liberal manner? After all, the Charter imposes a duty on judges to uphold the "equal protection and benefit of the law," a phrase that is at best general, at worst vague. And, as Chief Justice Antonio Lamer himself has said, the Supreme Court of Canada is "struggling" under the burden of trying to interpret the equality provisions of the Charter of Rights and Freedoms. "If you read the judgments coming out of this court," the Chief Justice said very recently, "I think it is apparent that we are struggling....And the courts below are strug-

gling. There is so much social impact....How far do we go in terms of seeing that everyone is equal?"[46] There can be little doubt that it is in the area of equality rights that the Court, on its own admission, has created a certain confusion.[47] In the now famous "equality rights trilogy" of cases of 1995 — *Miron*, *Egan*, and *Thibaudeau* — the Court left a cloud of confusion, for "there is no clear majority position in these cases," as one critic noted.[48] In *Miron*, a case where a common-law spouse sought the benefits of her injured husband's insurance policy, the Court ruled that the "exclusion of unmarried partners from accident benefits...violates section 15(1) of the Charter."[49] Yet in *Egan*, a case involving a same-sex relationship, the Court ruled that while "sexual orientation" is protected by section 15, the denial of spousal benefits was not a form of discrimination.[50] And in *Thibaudeau*, the Court held that the requirement that child support payments be declared as income does not violate section 15(1) of the Charter: single custodial parents are not discriminated against by the Income Tax Act.[51]

Justices of the Supreme Court itself have attempted to resolve what Justice L'Heureux-Dubé has called "the divergent approaches" to section 15. She has urged her colleagues to revisit the "fundamental purpose of section 15 and...to seek out a means by which to give full effect to this fundamental purpose."[52] The divergence among the judges was somewhat mitigated by three equality cases of 1997 in which the Court clearly made an effort to come to a clearer perception of what offends the equality section of the Charter.[53] In *Eaton v. Brant*,[54] a unanimous Supreme Court ruled that the Brant county school board did not violate the equality provision of the Charter by placing a child in a special education class because the child did not suffer any adverse affects despite the fact that he was being treated differently. And in *Eldridge v. British Columbia*, the Court ruled that the failure of the BC Medical Services Commission to provide sign language interpreters violated the Charter because the child suffered adversely from the failure to provide the service. In *Benner v. Canada (Secretary of State)*,[55] the Court considered the case of a man required to undergo a security check before being granted Canadian citizenship since he was born before February, 15, 1977 and his mother was a Canadian citizen. If his father had been a Canadian citizen he would not have been required to undergo the security check. The Court ruled unanimously that the Citizenship Act[56] violated section 15 of the Charter.

Legal Rights

While it can be said that, in many respects, cases arising under section 15, "equality rights," have proven to be the most difficult for the Court and have received the most publicity, the majority of Charter cases coming to the Court have arisen under the provisions guaranteeing "legal rights." All statistical studies of the Court's workload testify to this.[57] One hundred and forty-three out of one hundred and ninety-five Charter cases between 1982 and 1992 were legal rights cases. A review of these cases shows that the Court has not hesitated to use the legal rights provisions of the Charter "to develop new constitutional codes of conduct for Canadian police officers."[58] But despite the preponderance of activity in this area of the law and the impact on policing in Canada, the general public has been relatively undisturbed by these developments. By contrast, the United States Supreme Court rulings in *Escobedo v. Illinois (1964)*[59] and *Miranda v. Arizona (1966)*,[60] touching the right to counsel and self-incrimination, occasioned a flurry of public anger.[61]

The Canadian Charter of Rights and Freedoms protects a wide range of legal rights under sections 7 to 14: everything from "life, liberty and the security of the person," through "unreasonable search and seizure" and "the presumption of innocence" to the "right to the assistance of an interpreter." In

addition, legal rights under the Charter have arisen under analogous federal criminal statutes, such as the Criminal Code and the Narcotics Control Act.

It should come as no surprise, therefore, that so much litigation arises under this lengthy list of protections and guarantees. In many respects, the Charter has provided judges at all levels of the Canadian judiciary with a new set of tools with which to make a difference in criminal matters, even to prompt major changes in criminal procedure. But no level of the judiciary has responded to this new challenge more enthusiastically than the Supreme Court of Canada, especially in the early years. In *Hunter v. Southam*,[62] just two years after the adoption of the Charter, the Court struck down a provision of the Combines Investigation Act as "unreasonable search and seizure," ruling that the officer authorizing the searches was not sufficiently independent of the investigatory authority and that the grounds for the search were too weak. And in *Therens*,[63] the next year, the Supreme Court ruled that breathalyzer evidence obtained from an accused who had not been advised of his right to counsel could not be used against him at trial. The following year, the Supreme Court threw out a murder conviction because the accused was too intoxicated to appreciate the consequences of her waiving the right to counsel.[64] And in *Oakes*[65] the same year, the Court nullified a twenty-five year old provision of the Narcotics Control Act on the grounds that it shifted the burden of proof in some instances to the accused. A year later in *Manninen*[66] the Court quashed a robbery conviction because the police had not offered the accused a telephone when he asked to consult with his lawyer.

In cases involving an accused person's right to counsel and not to be compelled to testify against himself or herself, the Supreme Court has been especially innovative. In *R v. Hebert (1990)*,[67] for example, the Court ruled that since the accused was tricked into making incriminating statements to an undercover police agent, the statement was obtained in breach of section 7 of the Charter. The Court effectively created a new right not enunciated in the Charter, on the basis of the section 7 provision relating to "the principles of fundamental justice." The Court ruled that the "right to silence" was a "basic tenet of the legal system."[68]

Nor was the Court reluctant to come to grips with highly contentious issues such as the "rape shield" provisions of the Criminal Code. Rape shield provisions prevent a person charged with sexual assault from cross-examining a complainant about her past sexual activity. In *Seaboyer*[69] the Supreme Court ruled that the rape shield provision of the Criminal Code violated both section 7 and section 11(d) of the Charter guaranteeing an accused "the right to full answer and defence." The outcry among feminists groups over this decision resulted in Parliament replacing the Criminal Code rape shield provisions with even tougher ones. In an attempt to meet the Supreme Court's ruling in *Seaboyer*, however, the new law gives the trial judge discretion to include or exclude evidence from the past sexual history of the complainant.

Finally, when one looks at criminal matters in the Canadian courts one finds a certain confusion. The Supreme Court of Canada upheld the breathalyzer law and has consistently upheld the reverse onus features of Canadian criminal law relating to drunk driving offences.[70] The Court has been willing to allow random spot checks for drunk drivers — which clearly violate section 9 of the Charter guaranteeing that no one should be "arbitrarily detained" — as a "reasonable limit" and "demonstratively justified." And the Supreme Court recently upheld the right of teachers to search without a warrant students and their lockers for drugs.[71] Yet in a British Columbia case involving police searches the Court sent back for retrial an accused on the grounds that the police failed to get a search warrant before entering the man's house. In this case, the police followed a trail of blood to the accused person's residence. Prior to the Charter, the

Court would have allowed the search on probable grounds. The Court ruled, however, that the police are required by the Charter provisions relating to search and seizure to obtain a warrant. This and other Court rulings have led Harvie and Foster to conclude that "the Canadian Supreme Court has created broader procedural protections for the accused than now exist in United States jurisprudence."[72]

Conclusion

The foregoing review reveals that Canadian courts, while always prominent in the Canadian political process, have indeed, become more "activist" since the advent of the Charter. And the general public, due to a greater press coverage, has become more vocal in its criticism of the courts. On several recent occasions Canadians have become emotionally excited over judicial rulings such as the British Columbia Supreme Court's decision relating to the possession of child pornography,[73] as well as the Supreme Court of Canada's recent ruling in *Ewanchuk*, where the Court overturned two lower court decisions upholding "implied consent" in a sexual assault case. Not a few women writers, such as Lysiane Gagnon and Barbara Amiel, heaped scorn on the Ewanchuk[74] judgment. Wrote Gagnon: "It is absurd to believe, as the court does, that human sexuality is black and white and that there is no 'third option' between 'yes' and 'no'; absurd to expect that consent must be given at every step even if a woman sends out positive signals....absurd to assume that there can never be implied consent in the complex dance of seduction."[75]

The only thing one can say about trends in judicial activism in the Supreme Court of Canada is that there is emerging a consistent trend towards a liberal judicial philosophy, especially in matters relating to abortion, feminist causes, sexual orientation and the protection of the criminally accused. These advocacy areas have, clearly, benefitted most from the application of the Charter. The general conclusion to be drawn from this review is that the "Charter has served as a catalyst for a new era of judicial activism unparalleled in Canadian history." But it is difficult yet to agree that this activism has been "on a par with contemporary American practice."[76] We can safely say that the Supreme Court of Canada has emerged after a decade and a half of Charter litigation less aggressive that it first signaled in the early years, but nevertheless prepared to strike out boldly on occasion. One thing is certain, as long as the Charter of Rights and Freedoms remains a part of our constitution and central to the mandate of the Supreme Court of Canada, the Court will continue to be active in shaping the character of Canadian society.

IRPP Research Staff
Hugh Segal (president)
Paul Howe
France St-Hilaire
Carole Vincent

Director of Administration
Suzanne Ostiguy McIntyre

Series Editors
Peter Russell and Paul Howe

Research Assistant
Murray Mincoff

Design
Schumacher Design

Production
Chantal Létourneau

Printing
AGL Graphique

IRPP
1470 Peel Street, Suite 200
Montreal, Québec H3A 1T1
Telephone: 514-985-2461
Fax: 514-985-2559
E-mail: irpp@irpp.org
Web site: www.irpp.org

Notes

1 The leading critic of the Supreme Court's activism is F. L. Morton, a political scientist at the University of Calgary. See his "The Charter of Rights: Myth and Reality," in *After Liberalism: Essays in Search of Freedom, Virtue, and Order*, William D. Gairdner (ed.) (Toronto: Stoddart, 1998), p. 33.

2 See Preston Manning, "Parliament, Not Judges, Must Make the Laws of the Land," *Globe and Mail*, June 16, 1998, p. A23.

3 See, Gary McDowell, *Equity and the Constitution* (Chicago: The University of Chicago Press, 1982).

4 See, Mitchell Muncy (ed.), *The End of Democracy? The Judicial Usurpation of Politics* (Dallas: Spence Publishing, 1998).

5 George Sharswood (ed.), *Blackstone's Commentaries on the Laws of England* (Philadelphia: George W. Childs, 1866), p. 62.

6 See Eugene Forsey, "In defence of Macdonald's Constitution," *Dalhousie Law Journal*, Vol. 3, no. 2 (October 1976), p. 529.

7 W. P. M. Kennedy, *Essays in Constitutional Law* (Oxford: Oxford University Press, 1934), p. 85.

8 I do not intend to imply that the issue of judicial review in Canada is not controversial. See Barry Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968) for a critical discussion of the roots of the practice in Canada.

9 H. W. McConnell, "The Privy Council and the New Deal Cases," *Osgoode Hall Law Journal*, Vol. 9, no. 2 (November 1971), p. 221.

10 See James L. Huffman and MardiLyn Seathoff, "Advisory Opinions and Canadian Constitutional Development," *Minnesota Law Review*, Vol. 74, no. 6 (June 1990), p. 1251.

11 Huffman and Seathoff, "Advisory Opinions and Canadian Constitutional Development," pp. 1255-56.

12 See Barry Strayer, *The Canadian Constitution and the Courts*, 3rd ed. (Toronto: Butterworths, 1988), pp. 125-31.

13 See Sir Lyman Poore Duff, *Reference re Criminal Code* [1912] 43 S.C.R. 434 at p. 451.

14 See Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), pp. 214-16.

15 It is worth noting that seven states do permit the practice of seeking advisory opinions of their courts. See Huffman and Seathoff, "Advisory Opinions and Canadian Constitutional Development."

16 *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

17 *Reference re Secession of Quebec* [1998] at p. 221.

18 *Reference re Secession of Quebec* [1998] at p. 220.

19 See Sir Kenneth Roberts-Wray, "Human Rights in the Commonwealth," *International and Comparative Law Quarterly*, Vol. 17 (October 1968), p. 908. "It required the gross excesses attendant upon the second of the two world wars to shake us out of our complacency," p. 914. See also, S. A. deSmith, "Fundamental Rights in the New Commonwealth," *International and Comparative Law Quarterly*, Vol. 10, nos. I and II (January 1961), pp. 83 and 215.

20 See James C. McRuer, *Report of the Royal Commission of Inquiry Into Civil Rights* (Toronto: Queen's Printer, 1969).

21 Lisa Fitterman, "Canada's Reticent Role Revealed," *The Gazette*, Montreal, December 5, 1998, p. B3; and William A. Schabas, "Canada and the Adoption of the Universal Declaration of Rights," *McGill Law Journal*, Vol. 43, no. 2 (August 1998), p. 403. Schabas notes that "at its extreme, Canada's attitude bordered on hostility" (p. 406).

22 See, F. R. Scott, "Constitutional Adaptations to Changing Functions of Government," *Canadian Journal of Economics and Political Science*, Vol. XI, no. 3 (August 1945), p. 334.

23 For a brief discussion of civil liberties, see Hogg, *Constitutional Law of Canada*, Part III, pp. 765-69.

24 *Regina v. Drybones* [1969] S.C.R. 282.

25 *Robertson and Rosetanni v the Queen* [1963] 41 D.L.R. (2d) 485. See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, Inc., 1994), pp. 22-24 for a discussion of this case.

26 See A.S. Pattillo, Past President of the Canadian Bar Association, *Globe and Mail*, April 29, 1970, p. 5: "The Court of Last Resort Should not Get Mixed up in the Legislative Process."

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28 Gerard V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview," *The Canadian Bar Review*, Vol. 61, no. 1 (March 1983), p. 23.

29 *R v. Oakes* [1986] 1 S.C.R. 103.

30 Peter Russell, "The Supreme Court and the Charter: Quantitative Trends — Continuities and Discontinuities," *Canada Watch*, Vol. 6, nos. 4, 5 and 6 (October 1998), p. 61.

31 Russell, "The Supreme Court and the Charter," p. 63.

32 Russell, "The Supreme Court and the Charter," p. 64.

33 Russell, "The Supreme Court and the Charter."

34 See, Patrick J. Monahan, "The Supreme Court's 1997 Constitutional Decisions: A Statistical Overview," *Canada Watch*, Vol. 6, nos. 4, 5 and 6 (October 1998), p. 102.

35 Monahan, "The Supreme Court's 1997 Constitutional Decisions," p. 102.

36 Justice Willard Estey, *Law Society of Upper Canada v. Skapinker* [1984] 1 S.C.R. 357 at p. 366.

37 Justice Beverley McLachlin, "The Charter of Rights and Freedoms: A Judicial Perspective," *University of British Columbia Law Review*, Vol. 23, no. 3 (1989) p. 579.

38 *R v. Big M Drug Mart* [1985] 1 S.C.R. 295.

39 This is the interpretation placed on the Court's decision in *Big M Drug Mart* by Chief Justice Dickson *in R v. Edwards* [1986] 2 S.C.R. 713 at p. 754.

40 For a critical assessment of the Court's ruling in this case, see Rainer Knopff and F.L.Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992), p. 185-86.

41 *R.v. Big M Drug Mart* [1985] at p. 344.

42 *R.v. Big M Drug Mart* [1985] at p. 361.

43 *R v. Morgentaler* [1988] 1 S.C.R. 30.

44 *Egan v. Canada* [1995] 2 S.C.R. 513 at p. 517.

45 See the *Globe and Mail* editorial, "Reconciling rights and democracy," February 4, 1999, p. A14. See also, Gordon Gibson, "Gordon Wilson signs his NDP card," *Globe and Mail*, February 2, 1999, p. A15. Gibson muses: "What if the problem people deplore here has nothing to do with the court, but lies in the sacred cow of the Charter itself, which is increasingly wreaking legal havoc in the area of sexual mores?"

46 See, "Lamer Worries Potential Backlash Might Sway Judges," *The Sunday Daily News*, Halifax, February 10, 1999, p. 10.

47 See, Justice L'Heureux-Dubé's comment on the confusion of approaches to section 15 in *Egan v. Canada* at p. 541.

48 See, Debra M. McAllister, "Litigation Trends in 1997 Supreme Court Jurisprudence," *Canada Watch*, Vol. 6, nos. 4, 5 and 6 (October 1998), p. 68.

49 *Miron v. Trudel* [1995] 2 S.C.R. 418 at p. 420.

50 *Egan v. Canada* [1995] 2 S.C.R. 513 at p. 521.

51 *Thibaudeau v. Canada* [1995] 2 S.C.R. 627.

52 *Miron v. Trudel* [1995] at p. 541.

53 See, *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241; *Benner v. Canada* (Secretary of State) [1997] 1 S.C.R. 358 and *Eldridge v. British Columbia* [1997] 3 S.C.R. 624.

54 *Eaton v. Brant* [1997] 1 S.C.R. 241.

55 *Benner v. Canada* (Secretary of State) [1997] 1 S.C.R. 358.

56 *Citizenship Act*, R.S.C., 1985, c. C-29, section 3(1).

57 See F. L. Morton, Peter H. Russell and Troy Riddell, "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982 - 1992," *National Journal of Constitutional Law*, Vol. 5 (1994-1995), p. 1.

58 Morton, Russell and Riddell, "The Canadian Charter of Rights and Freedoms," p. 13.

59 *Escobedo v. Illinois* [1964] 378 US 478.

60 *Miranda v. Arizona* [1966] 394 US 436.

61 For a good discussion of these American cases, see Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986), pp. 294-98.

62 *Hunter v. Southam* [1984] 2 S.C.R. 145.

63 *R v. Therens* [1985] 1 S.C.R. 613.

64 See *Clarkson v. The Queen* [1986] 1 S.C.R. 383.

65 *R v. Oakes* [1986] 1 S.C.R. 103.

66 *R v. Manninen* [1987] 1 S.C.R. 1233.

67 *R v. Hebert* [1990] 2 S.C.R. 151.

68 *R v. Hebert* [1990] at p. 184 per McLachlin J., for the majority.

69 *R v. Seaboyer* [1991] 2 S.C.R. 577.

70 See *R v. Whyte* [1988] 2 S.C.R. 3 where Chief Justice Brian Dickson for a unanimous court upheld section 237(1)(a) of the Criminal Code which places "the onus of proof on the accused" in drunk driving cases.

71 This case is unreported at the time of writing. See "Supreme Court Rules in Favour of Surprise Locker Inspections," *The National Post*, November 27, 1998, p. A5 for a summary of the Court's judgement.

72 Robert Harvie and Hamar Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter," *Osgoode Hall Law Journal*, Vol. 28, no. 4 (Winter 1990), p. 779.

73 See, *R v. Sharpe*, British Columbia Supreme Court, New Westminster Registry, Docket no. x050427. The full judgment can be viewed on the internet: www.courts.gov.bc.ca.

74 *R.v. Ewanchuk*, February 25, 1999, Supreme Court of Canada, File no. 26493.

75 Lysiane Gagnon, "The Complex Dance of Seduction," *Globe and Mail*, March 6, 1999, p. D3. See also Barbara Amiel, "Feminists, Fascists and Other Radicals," *The National Post*, March 6, 1999, p. B7.

76 Morton, Russell and Riddell, "The Canadian Charter of Rights and Freedom," p. 8.

A British Bill of Rights: Incorporating The European Convention on Human Rights

Kate Malleson

On November 9th, 1998 the Queen gave royal assent to the Human Rights Act which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms into UK law.* It is expected that the Act will come into force in the year 2000. This paper examines the legal and political context in which the Act was passed nearly fifty years after the UK signed the Convention and seeks to assess the likely effects of incorporation both on the protection of human rights and the future relationship between Parliament, the executive and the judiciary.

The Background to Incorporating The European Convention

Prior to the Human Rights Act, the UK enjoyed the dubious distinction of being the last signatory state to the European Convention on Human Rights which had not incorporated it into domestic law or created an equivalent bill of rights. This apparent lack of enthusiasm for the Convention would, at first sight, appear to be at odds with the UK's early role in its creation.

* A list of the rights and freedoms incorporated in the Human Rights Act can be found in Appendix 1.

Having played a leading part in drafting the Convention, it was the first state to ratify it in 1951 and thus might have been expected to move quickly to incorporate its provisions into domestic law. But as cabinet papers from that period reveal, there was serious division in the government over the desirability of the Convention with strong resistance to the enterprise from some senior members of the post-war Labour Cabinet who felt that the Convention would threaten the creation of a planned economy.[1] The Lord Chancellor, Lord Jowitt, regarded it as "a half-baked scheme to be administered by some unknown court" which would allow the UK's European allies to jeopardize its whole system of law. He described the Convention as a document from which any student of the UK's legal institutions "would recoil with a feeling of horror."[2]

This opposition succeeded in watering down the Convention's effectiveness in a number of important respects. The original draft included a mandatory right of individual petition to the European Court of Human Rights, but as a result of British opposition the application of this provision was made optional for the signatory states. The UK duly declined to adopt it and the right of individuals to seek redress at the European Court of Human Rights in Strasbourg was not granted to UK citizens until 1966. In addition, the British government persuaded the other participants to limit the scope of the substantive rights by omitting any rights to property, education or political freedom.[3]

The explanation for this strong tradition of resistance to the Convention and the European legal machinery lies in the long and persistent attachment in British legal and political culture to the principle of parliamentary sovereignty and an unwritten constitution, both of which would be threatened by incorporating a bill of rights. In addition to being constitutionally dangerous, such a move was also regarded as unnecessary on the grounds that the common law provided an equally effective vehicle for protecting human rights. Together these beliefs, which had hindered the full embrace of the Convention at its inception, brought together significant sections of the political left and right for nearly half a century in blocking its incorporation into domestic law. It is only in recent years that a number of legal and political developments have come together to undermine the traditional coalition of interests which united against incorporation.

The UK's human rights record

The original purpose behind the European Convention on Human Rights was to create a tool which would hinder the repetition by some future despotic state of the human rights atrocities committed by Nazi Germany. For the British politicians and officials who participated in its creation, its function was primarily to check the potential abuse of power by the government of another European country rather than to provide protection for British citizens against breaches of human rights by their own government. The consistent position of successive British governments was that it was inappropriate for an international court to review the common law and statutes of the UK. In addition, there was concern that individual petitions would result in the "politically immature" citizens of the British Colonies being confused about where sovereignty lay. The effect would be that their loyalty would be shaken and agitation more likely to occur.[4] The imperialist confidence in the superiority of domestic law in protecting the citizens of the UK and all its overseas territories today appears breathtakingly arrogant. When in 1966 the UK government conceded the right of individuals to petition the Court the decision was taken without reference to Cabinet and it was evidently not anticipated that the change would lead to searching scrutiny of the UK's human rights record and the inadequacy of its domestic remedies.[5]

Thirty years later, the position could not have been more different. In the intervening years the

European Court of Human Rights had come to maturity and by 1996 had held the UK to be in breach of the Convention on 37 occasions, placing it near the top of the league of offending states. Thus, by the 1990s, whilst by wider international standards the UK could continue to claim a generally good human rights record, within Europe the history of claims against the UK government at Strasbourg had begun to tell a somewhat different story. Moreover, the cases which went against the UK at the European Court of Human Rights could not be dismissed as technical or trivial since many of them involved the most basic Convention rights, including the right to life (the killing of suspected IRA terrorists in Gibraltar), freedom from torture (the "hooding" of detainees in Northern Ireland),[6] arbitrary detention (four to seven day questioning of terrorist suspects in Northern Ireland) and the invasion of privacy (telephone tapping).[7] In addition, many of the cases involved some of the most vulnerable members of society, such as prisoners, mental patients, detained suspects and children. The steady stream of cases against the British government in Strasbourg inevitably came to undermine traditional confidence in the ability of existing legal processes and cultural norms to protect human rights in the UK. This view was reinforced in 1995 when the United Nations Human Rights Committee declared that the British legal system did not "fully ensure that an effective remedy is provided for all violations of the rights contained in the Covenant."[8]

In addition, the position of Parliament as the natural protector of human rights was significantly undermined by the fact that a high, and growing, proportion of successful claims consisted of challenges to recent legislation. Of the 37 adverse findings between 1975 and 1995, 24 were in relation to legislative provisions. By 1997, the director of the civil rights group, Liberty, claimed that all seven cases decided by the Court against the UK the previous year related to legislation.[9] Many commentators in the 1990s argued that ancient rights which had traditionally been held up as symbols of British justice had been overridden by Parliament.[10] The effect was to undermine the value of the common law as a mechanism for upholding human rights: "The common law presumption in favour of individual liberty crumbles like dust in the face of a statute which erodes that liberty."[11] Rights of citizenship, free speech, assembly and peaceful protest and the right of a defendant to remain silent in criminal proceedings had been eroded by statutes. In particular, the emergency terrorist legislation passed in response to the troubles in Northern Ireland, attracted a high degree of criticism as being ill-considered reactions to public outrage which put political expediency before human rights. The strengthening power of the executive *vis-à-vis* Parliament and the large parliamentary majorities of the Conservative administrations in the 1980s bolstered the claim that Parliament could not be relied upon to scrutinize government legislation from a human rights perspective or to reject that which it found to be in breach of basic rights. The collective result of these changes was that by the mid-1990s, Britain was commonly described as suffering from a human rights deficit.[12]

As concern about the UK's human rights record grew, the coalition of supporters for incorporation became broader and more vocal. Campaigning organisations such as Liberty and JUSTICE were joined by growing numbers of academics and practising lawyers. A few prominent individuals in the legal establishment, most notably Lord Lester, were instrumental in changing the climate of complacency about the UK's human rights record and advocating a bill of rights.[13] In addition, the high profile miscarriages of justice cases such as the Guildford Four and the Birmingham Six, which came to light in the late 1980s and early 1990s, exposed serious police malpractice. This indirectly added fuel to the cause for incorporation by highlighting the fact that the British justice system was

not immune from the risks of abuse of process. The traditional claim that Parliament and the British legal culture of fairness fully protected the human rights of those in the care or control of the state was no longer sustainable in the light of those cases.

In addition to the limitations of parliamentary effectiveness in securing human rights, the weaknesses of the common law were becoming increasingly obvious, particularly in relation to cases involving intrusive scrutiny by the media into individuals' private lives. The use of sophisticated surveillance equipment and powerful telephoto lenses attracted increasing concern. The inadequacy of the courts to protect people from such invasive techniques was highlighted in 1991 by the case of Gordon Kaye, a well-known actor who was photographed and interviewed in his hospital bed whilst seriously ill and unfit to give his consent. In the subsequent action brought by Kaye against the newspaper which published the story, Lord Justice Bingham, now the Lord Chief Justice, drew attention to the failure of the common law "to protect in an effective way the personal privacy of individual citizens."[14] Although by the mid-1990s the courts were beginning to develop an embryonic law of privacy through the law on breach of confidentiality, most lawyers agreed that this was neither an appropriate nor adequate way to ensure the proper protection of a basic human right.

Thus a consensus slowly emerged in the legal establishment and the civil rights community that the common law alone was no match for the expanding power of the media and the executive and could not be left to provide the necessary safeguards against abuse.[15] In 1990, the Institute for Public Policy Research drafted a bill of rights for Britain based on the European Convention on Human Rights and the International Covenant on Civil and Political Rights.[16] The following year, Liberty published a Charter of Rights, which drew on a wide range of international conventions and human rights instruments, including the anti-discrimination clauses of the Canadian Charter of Rights.[17] The availability of such documents from other countries was, in itself, a significant factor in the growing acceptance of the desirability of a domestic bill of rights.

International developments

In the early years after the ratification of the Convention, the divergence between the UK and the other signatory states on the question of incorporation was partly explicable as a product of the different civil law traditions of continental Europe. In the 1950s, almost all the common law world outside the US functioned without an entrenched bill of rights. Moreover, the US could be distinguished on the grounds of its very different political and legal culture, both in terms of the stricter separation of powers and the judicial review role fulfilled by the Supreme Court. Despite the precedents of Magna Carta in 1215 and the Bill of Rights in 1689, the argument that a bill of rights was an alien concept for Britain was widely accepted.[18] However, during the 1960s this argument was already being weakened by the gradual adoption of bills of rights throughout the Commonwealth countries, the political and legal systems of which were closely modelled on that of England. By 1980, a total of 24 Commonwealth countries had adopted codes of fundamental rights based on the European Convention.[19] By the mid-1990s, Canada, New Zealand, Israel, Hong Kong and South Africa had also all adopted some form of bill of rights.[20]

The spread of rights documents throughout the common law world affected the debate on incorporation in the UK in two ways. First, it provided models for civil rights bodies and lawyers to draw upon in drafting proposed bills of rights for Britain. Second, it represented a global trend toward the incorporation of human rights documents which left the UK increasingly isolated. The Canadian experience in particular, having been in operation since the early 1980s, was increasingly viewed as

providing support for the argument that entrenching a bill of rights did not necessarily herald a legal or political revolution but could be incorporated into a common law system as an evolutionary step in the development of a more rights-based approach.

Changing political perspectives on a bill of rights

The fact that the Human Rights Act was introduced by a Labour government would suggest that incorporating the Convention was traditionally a policy of the political left. But paradoxically, it was Conservative politicians who first showed an interest in the idea in the 1960s and 1970s, in response to the policies of the socialist administrations of that period. In particular, the nationalization of industries under the Labour government generated support for a bill of rights amongst the right as a means of protecting existing property rights. The Conservative politician, Lord Hailsham, later Lord Chancellor, regarded a bill of rights as a potential mechanism for curbing the oppressive power of what he termed the "elective dictatorship."[21] However, support for incorporation amongst members of the Conservative party quickly waned on taking office again in 1979 and was implacably opposed by the Thatcher and Major governments throughout the 1980s and early 1990s.[22]

In recent years, there has been some resurgence of support for a bill of rights amongst Conservatives in the light of the growing power of Europe. Ferdinand Mount, former policy adviser to Margaret Thatcher when Prime Minister, has argued that incorporation would counter the erosion of the English legal system by European institutions by allowing English judges to build up a body of case law which was appropriate to UK needs and circumstances and so "rescue and revitalise the common law tradition."[23] Interestingly, the same point was promoted by the Labour government in its consultation paper which introduced the proposals for the Human Rights Act in 1997: "British judges will be enabled to make a distinctly British contribution to the development of the jurisprudence of human rights in Europe."[24] Though some Conservative supporters may be reassured by this claim, those on the political right in general remain opposed to the promotion of a rights-based culture and the potential threat which it poses to the full development of free markets. The historical link between a bill of rights and the policies of the political left in the US has entrenched hostility toward incorporation in the UK amongst many Conservatives.

The attitude of the Labour party to a bill of rights, has, until relatively recently, been hardly any more enthusiastic. Throughout the 1960s and 1970s, Labour governments remained opposed to incorporation on the grounds that judges could not be trusted with the task of upholding rights. The record of the judges in such areas as labour disputes, in which they were widely perceived to be hostile to trade union interests, led commentators such as Professor John Griffith to recoil from the prospect of transferring the task of protecting human rights from Parliament to the judges.[25] The erosion of parliamentary sovereignty was, and remains, the strongest ground of objection amongst many on the political left. This mistrust of the judiciary as potential guardians of human rights was not confined to socialists but was widespread amongst liberals both in and out of the Labour party. For example, Lord Lester, a lifelong supporter of a bill of rights, originally argued in the 1970s that English judges could not be trusted to apply a bill of rights in a "progressive and liberal spirit" and he argued therefore that the bill should not be enforceable in the courts but rather that a Constitutional Council should be used to make recommendations about the compatibility of legislation.[26] Similarly, Liberty, in its People's Charter, proposed that a parliamentary scrutiny committee rather than the courts would have the primary role of enforcing the bill. Just as some Conservatives had recognised the potential of a bill of rights to curb socialist policies

in the 1970s, for the same reason the Labour party did not intend to risk its policies being hindered by an obstructive judiciary.

The consequence of these objections was that the support which was voiced for incorporation during the 1980s came almost exclusively from liberals occupying the centre ground of the political spectrum at a time when this group was relatively powerless in British politics. The domination of the New Right under Margaret Thatcher and the conflict within the Labour party between Old and New Labour largely isolated traditional liberals in either party. Thus although from the 1970s a number of bills were introduced in Parliament to incorporate a bill of rights, there was never sufficient support for these to be enacted. In 1984, Lord Lester wrote that if incorporation depended on obtaining a political consensus it would not happen in the near future since the Labour party remained firmly opposed to it.[27] Over the following decade, however, that elusive consensus began to emerge. The defeat of the socialist wing of the Labour party in the power struggle of the early 1990s removed the most ardent opponents of the change. In 1993, then Labour leader John Smith first supported the policy in a speech to the constitutional reform group, Charter 88. Smith's successor, Tony Blair, followed his lead and expressed his clear backing for the change on being elected party leader. In 1995, forty years of opposition to the reform was finally abandoned when incorporation was officially adopted as Labour party policy.

The shift within the Labour party and those on the political left in general toward a bill of rights is explained largely by the changing perception of the British judges' record on human rights throughout the 1980s and 1990s. During this period, the senior judiciary had shown itself increasingly willing to exercise its powers to review the legality of administrative action.[28] In 1994, Lord Griffiths highlighted the human rights basis for the judges' role in scrutinizing and checking administrative action:

> The judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

On a number of highly publicized occasions during this period the decisions of Conservative ministers were quashed by the higher courts leading to the widespread view that the radical policies of the Thatcher administration had, for the first time, weakened the natural alliance between the judges and the Conservative party.[30] Professor John Griffith, in the 1977 edition of *The Politics of the Judiciary*, his critical review of the politics of judicial law-making, originally argued that the views and beliefs of the judges as reflected in their judgments most often correlated to those of the Conservative party. By 1997, however, Griffith had removed the association of the judges with the Conservative party and relegated their conservatism to that of a small c.[31] The judges themselves played down the political nature of any conflict between the Conservative government and the judiciary, stressing, firstly, that their task was limited to reviewing questions of law and procedure rather than policy and, secondly, that the majority of judicial review cases went in favour of the government. Some members of the senior judiciary did, however, acknowledge that the greater willingness on the part of the judiciary to scrutinize the actions of government during the 1990s had partly arisen because one political party had been in power for an exceptionally long period.[32] Commentators outside the judiciary also argued that the large Conservative majority, combined with the loss of political direction within the Labour party, left Britain with a vacuum in the political centre ground into which the judges were drawn, reluctantly or otherwise, to fulfil the role of a quasi-opposition.[33]

Whatever the explanation for the increasing judicial activism in the 1980s and 1990s, its effect

was to change the mood of the political left toward the judges as potential guardians of human rights and to erode the longstanding resistance to incorporation. In addition, opinion polls during the 1990s all showed consistently strong support of up to 80 percent amongst the public for incorporation.[34] For a party which had lost four elections in a row and faced political oblivion if defeated at the fifth, the demonstration of public support for incorporation was a prerequisite for its inclusion in the manifesto. The Labour party's commitment to the reform was also strengthened by the fact that incorporation was not an isolated policy but one part of a much broader package of constitutional reform covering devolution to Scotland and Wales and the reform of the House of Lords. For these reasons the election of the Labour government in 1997 meant that incorporation was almost guaranteed and the following year the Human Rights Bill was successfully passed over 30 years after the first such bill had been considered by Parliament.

Changing judicial attitudes toward a bill of rights

Perhaps the most striking change in the public debate on a bill of rights in Britain has been the conversion of the judiciary to the cause for incorporation. Traditionally, almost all the senior judges expressed their opposition to a bill of rights on the grounds that it would force them to cross the Rubicon between law and policy and so undermine the basis of their independence. One notable exception to this consensus was Lord Scarman who first set out the case for incorporation in 1974 and remained committed to the reform in the years that followed.[35] During the 1970s he was something of a lone voice in the judiciary, but throughout the 1980s and 1990s a number of senior judges began to indicate their support for the change. By 1997, the reform was actively supported by a number of top ranking judges, including the Master of the Rolls, Lord Woolf, the Lord Chief Justice, Lord Bingham (and by his predecessor the late Lord Taylor) and Lords Ackner, Lloyd, and Slynn. Some, such as Lord Denning, underwent a change of heart on the matter.[36] Others, more recently appointed, brought their support for incorporation with them to the bench. Paradoxically, many of the new generation of the senior judiciary who supported a bill of rights were appointed by the Conservative Lord Chancellor, Lord Mackay, who remained implacably against incorporation as being an inappropriate expansion of judicial power. His replacement by the Labour Lord Chancellor, Lord Irvine, after the general election in May 1997 meant that there was, for the first time, a strong consensus in favour amongst the senior judiciary.

A number of different factors can be identified as contributing to the very marked change of attitude towards incorporation amongst the judges. A key consideration was the growing concern about the relative impotence of Parliament to protect human rights in the face of the expanding power of the executive. Lord Bingham stressed that at a practical level Parliament no longer had the time to correct derogations from human rights.[37] Less publicly, other judges acknowledged an equal lack of inclination. Many shared the opinion of Lord Williams, a leading barrister and now a member of the government in the House of Lords, who commented that judges had been forced to adopt powers to review administrative decision making because Parliament has been "too busy, too supine or too fearful" to define the limits of government power with regards to human rights issues.[38] In addition, the growing willingness of the judiciary to scrutinize the legality, rationality and fairness of official decision making had weakened the argument that the judges did not have the experience or outlook necessary to undertake the more active and purposeful decision making required in the field of human rights law. The relatively passive and restrained approach to law-making and interpretation which had prevailed amongst English judges in the 1950s and 1960s had long been eroded by the

time the Labour government published its proposals for incorporation in 1997 to a receptive judiciary. With the support of the judiciary assured, another longstanding hurdle to incorporation was removed.

Constructing the Model of Incorporation

With a very large majority and broad support for incorporation, the new Labour government was confident of a relatively easy passage for its Human Rights Bill. The controversial question had shifted from whether incorporation was a good idea to what form it should take — in particular, how to reconcile the requirements of parliamentary sovereignty with a meaningful structure for embedding, if not entrenching, human rights into the UK legal system.

Parliamentary sovereignty and the judiciary

For answers to this problem, the government looked abroad to the experiences of other countries which had successfully incorporated a bill of rights.[39] In the period before the bill was introduced a debate arose both within government and amongst the supporters of incorporation outside over the merits of the different systems. The US, although one of the oldest and best known examples in the common law world, was never a serious contender as a model for the UK since the Supreme Court's unqualified powers to strike down unconstitutional legislation were generally considered incompatible with the constitutional arrangements in Britain. For this reason also, the South African arrangements in which the new Constitutional Court has similar powers were generally rejected despite being much closer in other respects to the UK legal system.

Much stronger support was shown amongst some lawyers and civil libertarians for the Canadian model as being a good compromise between the demands of parliamentary sovereignty and the overriding importance of human rights. The strongest competitor to the Canadian model was the New Zealand Bill of Rights Act 1990, which gives the courts more limited power to interpret legislation in a way that is compatible with the Bill of Rights but with no power to strike down provisions which contravene it. This model was rejected as "toothless" by some commentators but preferred by those who gave priority to the need to retain full parliamentary sovereignty. A third option which gained some support was the Hong Kong model which distinguished between legislation enacted before and after the 1991 Bill of Rights Ordinance, previous legislation being subordinated to the Ordinance and subsequent taking precedence.[40] Ultimately however, the government rejected all variations which gave the courts any powers to set aside primary legislation as being a fundamental breach of parliamentary sovereignty:

> To make provisions in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament.[41]

Having rejected the stronger models of incorporation, the government did not, as expected, adopt the New Zealand approach. Instead, it devised a formula which followed none of the existing models and which purports to offer a uniquely British solution to the problem. Under section 3 of the Act the courts are placed under a duty to interpret all legislation in accordance with the Convention "as far as it is possible to do so." Where this cannot be done, the higher courts are empowered to make a "declaration of incompatibility."[42] The Act then provides for a fast track procedure by which the government can amend the offending legislation in order to make it compatible with the Convention.[43]

In the meantime, the Act remains law. However, the consultation paper envisaged that a declaration of incompatibility would "almost certainly prompt the government and Parliament to change the law."[44]

Thus parliamentary sovereignty is preserved, while at the same time the conditions are provided for courts to identify provisions which breach the Convention and for these to be brought into line speedily. This relatively unstructured approach to such an important element of the constitutional arrangement would be anathema to any country with a written constitution. But for Britain, the solution is in keeping with the nature of its unwritten constitution, since it provides the conditions in which new constitutional conventions can emerge. The Act is premised on a number of political assumptions: first, that Parliament will strive to ensure that new legislation is compatible with the Convention; second, that the courts will strive to limit the use of declarations of incompatibility to those few cases where it is absolutely impossible to interpret in a way which is compatible; and third, that Parliament and the government will respond promptly to correct the breach in those rare cases. If, after a period of time this pattern is consistently followed, the responses of all branches of state will become identified as generally binding constitutional conventions and will have a force which is not evident from the words of the Act itself.

The disadvantage of this relatively loose arrangement is, of course, that shared by all constitutional conventions, that no formal sanctions exist should the parties fail to "play the game." The danger posed by the use of this non-binding approach to the amendment of laws ruled incompatible is that it leaves a potential constitutional vacuum into which legislation might fall. If an Act has been declared incompatible but is not amended, courts will be left with the task, in future hearings in which the law is relied upon, of enforcing legislation which they have held to be in breach of fundamental human rights. In such circumstances the moral legitimacy of the law itself, and the judges' decisions based upon it, would inevitably be undermined. Although in most cases it is unlikely that such an impasse would arise between the government, Parliament and the judiciary, there are some obvious danger points, in particular, in relation to the passage of emergency terrorism legislation. It is this area which to date has caused the UK government particular conflict with the European Court of Human Rights. In 1988, for example, the Court ruled that the detention of suspects for a period of four to seven days under the Prevention of Terrorism Act 1984 was in breach of the Convention. In response to the decision, the UK exercised its right to derogate from the provisions and has not, to date, amended the offending legislation.[45] With this precedent in mind, it is quite possible that a government might respond in a similar manner to a declaration of incompatibility in relation to terrorist legislation by the domestic courts. In 1998, the Criminal Justice (Terrorism and Conspiracy) Act was passed in the space of a few days in response to the bombing at Omagh in Northern Ireland. Its provisions, which make it easier to convict an accused person of belonging to a proscribed organisation, have been criticised by civil rights lawyers as potentially in breach of the Convention. If they are successfully challenged once the Human Rights Act is implemented, it is hard to imagine that the government which was responsible for introducing the Act would move swiftly to amend it.

One way in which such conflict can be avoided is by ensuring that legislation which is in breach of the Convention is not passed in the first place. The Act seeks to reduce the danger that a recently passed act is ruled incompatible by requiring that the minister responsible for a new piece of legislation must make a statement to Parliament that in his or her view the bill is compatible with the Convention or that he or she cannot provide such an assurance but

the government wishes to proceed nonetheless.[46] The consultation paper anticipates that a negative declaration may be made when, for example, the interpretation of the Convention in that area is unclear or contradictory. Such occasions are clearly intended to be rare and the provision is based on the assumption that most ministers would wish, if possible, to be able to make a statement of compatibility. One effect of this attempt to encourage ministers to ensure that legislation is "declaration proof" before passing it may be to promote greater coordination between the judiciary and the government about the possible human rights implications of proposed legislation. If judges are consulted about the human rights implications of government policy at the early stages of its formulation the risk of incompatible legislation finding its way onto the statute books will be considerably reduced. Whether or not this role will be considered appropriate for the judiciary remains to be seen. At present the government intends to carry out the screening process through a parliamentary committee, although there is a strong lobby outside government in favour of the creation of a human rights commission to fulfil this function which may yet prevail.[47]

Public Authorities and Convention Rights

Although the Act does not give the judges the power to rule legislation unconstitutional, it hands to the courts the task of ensuring that the Convention is complied with in public decision making. In an unexpectedly wide and imaginative section, the Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.[48] Moreover, the government has made clear that public authorities are intended to be defined widely, including, for example the Church and the privatized utilities such as gas and water companies.[49] The Act also defines the courts themselves as public authorities which has generally been taken to mean that judges will be under a duty to apply and develop the common law in conformity with the Convention. Some commentators have suggested that this provision will have the effect of indirectly extending the application of the Convention to the law regulating private individuals and institutions as well as public bodies.[50]

One effect of including all courts in the category of public authorities is that those whose rights have been breached will be able to argue their case in all levels of courts in all proceedings. The government's intention, as stated in the consultation paper, is to import Convention rights into the day-to-day business of the courts:

> This will make it possible for people to invoke their rights in any proceedings – civil or criminal – brought against them by a public body or in proceedings which they may bring against a public body. The Government prefers a system in which Convention rights can be called upon as they arise, in normal court proceedings, rather than confining their consideration to some kind of constitutional court.[51]

The effect of this approach is that every court from the lowest magistrates court to the House of Lords, every government department and every public or semi-public institution across the country will, for the first time, need to consider whether its procedures and decision making are being carried out in accordance with Convention rights. The significance of this change is indicated by the fact that implementation of the legislation has been delayed for over a year to allow for a human rights training program to be carried out for judges and magistrates at a cost of £5 million – over twice the current annual training budget of the judiciary.

While the scrutiny of administrative action will not in itself be a new undertaking for the judges, since the role of the judiciary in reviewing administrative action is now firmly established, the

expansion in the scope of the courts' role in this area is unprecedented. To date, the courts have generally limited their review to the question of whether administrative action is legal, rational and in conformity with the requirements of natural justice. They have explicitly rejected any claim to have a role in reviewing the merits of the policy being implemented. In the seminal case of *Brind*, the House of Lords rejected an application by a group of journalists to review the Home Secretary's decision to restrict the broadcasting of the voices of members of proscribed organisations with terrorist links. The court held that the Home Secretary's decision to exercise his discretion in that manner under the Broadcasting Act was both legal and rational and could therefore not be challenged in the courts. The judges held that for them to consider whether the decision amounted to a breach of Article 10 of the European Convention on Human Rights, the right to freedom of expression, would amount to incorporating the Convention by the "back door" and would thus be a judicial usurpation of legislative powers.[52] If the same case were brought in the year 2000 the court would be required to consider the merits of the decision in the light of Article 10 and to decide whether the restriction imposed by the Home Secretary was "necessary in a democratic society."[53]

The expansion of the judges into policy areas which have traditionally been the preserve of the executive or Parliament brings with it the inevitable potential for conflict between the branches of government even without any formal erosion of parliamentary sovereignty. However, such conflict is not unprecedented. Tension between the judiciary and the executive has arisen periodically over the years.[54] During the 1980s, relations between the senior judiciary and the executive were strained over the government's introduction of mandatory and minimum sentencing provisions and the extension of rights of audience in the higher courts to solicitors. One notable feature of such past conflicts, however, is that they have generally been limited to policy changes which relate to the administration of justice. By convention it is this area alone in which law lords participate as legislators in the House of Lords and senior judges engage in public debate. In the post-Human Rights Act era it is possible that the intervention of judges in other policy areas in their judicial decision making may lead to conflict, or at least the appearance of conflict, between the branches of government in areas which are not strictly limited to the administration of the legal system and which have traditionally been regarded as outside the legitimate concern of the judiciary. Whether or not such conflict arises will partly depend on the impact which the Convention rights have, in practice, on the courts' decision making.

Implications for the development of human rights law in the UK

The dominant and most controversial subject in the current debate on the Human Rights Act concerns the extent to which it will have any significant impact on the courts' decisions. In one respect the consultation paper which introduced the proposals gives the impression that the Act is not intended to reform radically the state of human rights law in the UK. The title of the paper, "Rights Brought Home," emphasises that the primary purpose of the legislation is to make more accessible the rights which British citizens have already enjoyed for nearly 50 years. By allowing those rights to be enforced in the domestic courts, individuals who allege a breach will be saved the considerable time and cost of going to Strasbourg for their cases to be decided in the European Court of Human Rights. But the notion that the Act merely brings rights home obscures the more profound effects which the government also clearly envisages for the legislation. In a recent and related government consultation paper on changes to the legal system, the Human Rights Act is described as rep-

resenting a "radical extension of the jurisdiction of the courts in the UK."[55] The Lord Chancellor has also made clear that the Act was designed to facilitate a significant shift in legal culture towards a more rights-based approach to justice. In November 1998, the Lord Chancellor's Department released the text of a letter written by Lord Irvine to all full-time judges explaining his hopes for the legislation in the following way:

> With proper training and planning, I am confident that all courts and tribunals will be able to give full effect to the rights recognised by the Convention and to make their distinctive contribution to fostering a culture of awareness of, and respect for, human rights throughout the whole of society.[56]

Whether or not the Act has the effect intended by Lord Irvine depends ultimately on the willingness of the judges to adopt their new power to take account of Convention rights in interpreting legislation, developing the common law and scrutinizing the decisions of public bodies and officials. An indication of their likely future practices can be gleaned by examining their past and current approach to human rights. For those anticipating a proactive approach, the omens look good, since the courts have clearly signalled their willingness to incorporate a rights-based approach in their decision making. There are a number of different ways in which the Convention currently finds its way into the courts despite the fact that it is not yet part of domestic law. First, it can be used in the process of statutory interpretation where legislation is ambiguous, since it is assumed by the courts that Parliament would not intend to legislate in a way which is inconsistent with the Convention unless it clearly indicated that intention. The number of cases in which the Convention can be used in interpreting ambiguous legislation is relatively limited, but nevertheless the courts have increasingly allowed such arguments to be made where applicable.[57] Second, Convention arguments have been used in court where the common law is uncertain or has gaps, as an aid to guiding the courts' decision making.[58] Similarly, in judicial review cases the courts have sometimes been willing to take into account human rights standards as being relevant to the legality, rationality and compliance with natural justice of administrative action.

The courts have also developed experience in indirect application of the convention through the application of European Community law. Such law, which takes precedence over conflicting domestic law, is required by the European Court of Justice at Luxembourg to comply with the Convention. Thus in applying European law in the UK, British judges are indirectly applying the Convention. One additional effect of the UK courts' growing familiarity with European Community law is their increasing willingness to apply the European law principles of "proportionality" and "legitimate expectation" which are essential tools of interpretation for a bill of rights and which were quite alien concepts to the judges twenty years ago.

Thus, for the Human Rights Act to fail to have the intended effect of enabling Convention arguments to permeate legal reasoning the judiciary would need to apply a brake to a process of adaptation which is already firmly underway.[59] Nor is there any doubt that such cases will come before the court in significant numbers. The organisation Liberty has suggested that there are at least 70 key areas of public life where current practices may breach human rights and be open to challenge. The areas in which it is currently anticipated that challenges are most likely to be made are Article 5 (arrest and detention), Article 6 (fair trial provisions) and Article 8 (the right to privacy). The right to life provisions of Article 2, are also expected to lead to a number of challenges to the rationing decisions of health authorities in allocating their limited resources.

However, the willingness of the courts to open its doors to rights-based arguments does not mean that their decisions will inevitably be different as a

result. The record to date suggests that the courts may take a generally conservative attitude to the interpretation of the scope of the rights. In a review of 316 cases between 1975 and 1996 in which the courts had accepted Convention arguments it was found that in only 16 the outcome could be said to have actually been influenced by the rights.[60] The authors of the research conclude that the courts were inhibited by common law practices and procedures which had advanced little over the last 25 years. Whether or not the Human Rights Act will release the courts from those restrictions remains to be seen. Ultimately the approach will be determined by the political and legal culture of the courts. Although the judges are obliged to "take account" of the existing jurisprudence of the European Court of Human Rights they are not bound by it. Moreover, much of the existing jurisprudence is contradictory and many gaps exist. Equally, the judges are not bound by their previous decisions reached before the Act on the construction of legislation since the new requirement to interpret legislation so as to uphold Convention rights may mean that an earlier interpretation of legislation must be overruled.[61] This means that the judges are free to build a new body of case law taking into account Convention rights in whatever way they see fit.

In some areas concerning blatant discriminatory treatment the indications are that the courts will make full use of the Convention to change the law. In the case of *Smith*, for example, in which four gay plaintiffs challenged the decision of the army to dismiss them on the grounds of their sexual orientation, the judges expressed regret that they were not empowered to quash the decision as a breach of the Convention. If the *Smith* case, or an equivalent, is reheard after implementation of the Act, the decision is extremely likely to be reversed. In the field of criminal justice the courts may be less predictable. In considering some legislation, such as the recent abolition of a defendant's absolute right of silence, the courts are very unlikely to hold the provisions to be in breach of the fair trial requirements of Article 6, since the senior judges have clearly signalled their support for the change.[62] In others, such as the reduction of the prosecution's duty of advanced disclosure, the courts may be more receptive to the claim that the provisions breach the fair trial provisions, since the judges have expressed support for the imposition of a wide duty of disclosure. In provisions where due process or freedom of expression have been curbed in response to the threat of terrorism, the courts may well be unwilling to uphold a challenge since their record in this area suggests that the judges have generally been willing to accept such restrictions as being "necessary in a democratic society."[63]

Thus, despite the rejection of a model which would give powers to strike down incompatible legislation, the Act clearly provides the courts with the opportunity to reshape the law in the light of the Convention rights. Although the enthusiasm of the judges to undertake this new task is likely to differ from one area to another, there can be little doubt that real and significant change will occur as a result of the Act which has implications outside the narrow confines of the legal world and raises questions about the future of the judiciary.

Implications for the Composition and Appointment of the Judiciary

The combination of the power to make a declaration of incompatibility and to police the decision making of public authorities unquestionably amounts to a significant shift of power to the judges, as Lord Irvine himself has acknowledged.[64] The open-ended nature of the Convention rights means that judges will now become the guardians of fundamental democratic values. As the consultation paper made clear, the

Convention is a "living document" which must be interpreted in the light of changing social conditions. It is the judges who will be called upon to decide between such conflicting rights as privacy and freedom of expression, as well as the competing demands of individual rights and collective needs. The role of determining which of these different interests should, at any one time, be given priority is a quite different judicial function from that of resolving disputes between two parties by applying rules to facts as has been the traditional task of British judges.[65] This increased power which the judiciary is being given will have knock-on effects on its role and function. If it is to determine the values of a democratic society, questions about who the judges are and how they are chosen take on a new significance.

The politics of the judicial appointments process

In the years since the Second World War, it has been widely claimed that the judicial appointments process operates outside the political system. This does not mean, of course, that judges come to the bench devoid of political views. The debate about the extent to which those views influence judicial decision making has been a long and controversial one.[66] But there is broad agreement that the party political allegiance of judges no longer has a role to play in the appointments process. Constitutionally, judges up to and including the High Court are appointed by the Queen on the advice of the Lord Chancellor, while judges above the High Court are appointed by the Queen on the advice of the Prime Minister who acts on the recommendation of the Lord Chancellor. By convention, the Queen plays no part in the decision and the Prime Minister is guided by the Lord Chancellor and does not seek to influence the political make-up of the judiciary. The Lord Chancellor, in turn, appoints on the basis of merit rather than political patronage. This claim is supported by a review of the recent appointments to the senior judiciary. Those selected by the Conservative Lord Chancellor, Lord Mackay, included a significant number of lawyers with strong liberal reputations whilst the first two Law Lords appointed by the Labour Lord Chancellor, Lord Irvine, have reputations as conservatives.

In the light of the expanding policy making role of the judges, there must now be a question mark over whether this convention of nonpartisan appointment can survive. The idea that future Prime Ministers will continue to be willing to leave the choice of the senior judiciary to the Lord Chancellor once the judges are called upon to decide on questions which may affect government policy is clearly open to doubt. The ability of a convention to withstand political pressure to erode it depends on it being both old and clearly defined. The convention of nonpartisan judicial appointments is neither. Appointment on the basis of merit alone is a post-war phenomenon – before 1945 it was quite normal for judicial appointment to be given as a reward for political support. Moreover, the exact boundaries of the convention have never been clearly set out. In the 1980s, for example, it was revealed that, in at least one instance, Margaret Thatcher rejected the first choice of her Lord Chancellor, Lord Mackay, and this was apparently regarded as constitutionally acceptable both by the Lord Chancellor and by Parliament.[67] Since neither Lord Mackay nor any other Lord Chancellor has been prepared to reveal the exact nature of the advisory process, it is hard to determine exactly what is and is not an acceptable involvement in the selection process on the part of the Prime Minister. Thus, since the convention is both relatively new and relatively uncertain, the potential for its erosion is clear.

Moreover, the increasing interest in the political views of the judges will not be limited to the politicians who appoint them. Once judges reach decisions which choose between basic competing values in society, the apolitical nature of their decision making will be called into question by the public.

As one newspaper editorial recently suggested "It will be impossible for the public to view judges as impartial interpreters of the law - they will be caught up in the partisanship of politics."[68]

Increasing openness and accountability in judicial appointments

The potential increase in politics in the appointments process as a result of the new role of the judiciary is widely regarded in a negative light as a threat to judicial independence. More positively, it can be regarded as a necessary increase in public accountability. One effect of greater politicization of the judiciary will be that the judges will be obliged to accept the requirements of greater openness. To date, very little is publicly known about the politics or beliefs of the judges who are appointed to the higher courts. This lack of transparency has been justified on the grounds that it preserves judicial independence. However, the argument that judicial independence requires the complete removal of judicial candidates from any form of public scrutiny had come under attack even before the Human Rights Act was passed. The media has in recent years become increasingly vocal in its criticism of the appointments process. In 1998, the appointment of Lords Hobhouse and Millett attracted unprecedented coverage in both the quality and popular press, which criticized the fact that the men were chosen in secret.[69] Whether reflecting or forming public opinion (or both), such scrutiny inevitably impacts upon public confidence in the current arrangements.

A further example of the change in the level of public interest in the politics of the judges was indicated by the media interest attracted by the Pinochet case in November 1998.[70] The backgrounds and reputations of the five Law Lords who heard the case were scrutinized in detail in the press, radio and television coverage amid much speculation about the liberality or conservatism of their views.[71] One effect of the intense scrutiny of the case was that the proportion of the British public who knew something about the judges who sit in the highest court in the UK increased dramatically. Future human rights cases may not attract the international interest of the Pinochet case, but in Britain the precedent of full media coverage and public debate is likely to be followed. As a result, questions about the views and attitudes of the senior judges will find their way onto the political agenda.

The unrepresentative backgrounds of the judges

One effect of increasing public scrutiny of the judicial appointments process is a growing interest in the composition of the judiciary. Traditionally, the judiciary has countered criticism of its unrepresentative make-up with the argument that it is a body of experienced specialists selected purely on the basis of their legal skills. Nevertheless, the striking homogeneity in the background of the judges has attracted criticism over many years and as the policy making role of the judges grows the claim that the make-up of the judiciary is not a matter of general public concern will become unsustainable. As the power of the judges expands, the debate on the composition of the judiciary is bound to intensify. The vision of a group of white, elderly men, educated almost exclusively at private schools and Oxford or Cambridge University, deciding on essential social values in areas such as gay rights, abortion, euthanasia and health care rationing will inevitably attract growing criticism.

The judiciary stresses that its composition is a reflection of the make-up of the legal profession and therefore something which will change naturally as younger lawyers drawn from more diverse backgrounds "trickle-up" through the ranks. Critics of this analysis point to structural and cultural barriers which keep non-traditional candidates out of the system and argue that more fundamental and conscious changes will be needed to the appointments process if a greater diversity in the compo-

sition of the judiciary is to be achieved.

The reform of the judicial appointments process

During recent years, the Lord Chancellor's Department has sought to address these criticisms of the system by introducing greater transparency into the appointments process, through the use of job advertisements, published selection criteria, formal interviews and the active encouragement of women and ethnic minority lawyers to apply for judicial office.[72] Despite these efforts, the reform lobby is growing stronger and proposals for the establishment of a judicial appointments commission now attract widespread support.[73] When the Labour government came to power in 1997, one of the first acts of the new Lord Chancellor, Lord Irvine, was to set up a consultation process on the creation of a judicial commission and to commission comparative research on the systems in North America and Europe.[74] Before the process was completed, however, he decided that the Lord Chancellor's Department was already overburdened with a program of reform in the areas of Legal Aid and the Civil Justice Process and could not initiate any further changes. But although the proposal for a commission was set aside, Lord Irvine made clear that he did not reject the idea outright. A year later he conceded that the implementation of the Human Rights Act in 2000 would inevitably lead to greater scrutiny of judges' backgrounds and he indicated that he might now be ready to consult over the possibility of setting up a commission.[75] Whether or not the Lord Chancellor moves ahead with a commission in the short-term, the pressure for reform of the system is bound to intensify and it can only be a matter of time before some significant change is introduced in response to the new role which the judiciary is being asked to fulfil.[76]

Conclusion

Over a period of thirty years the debate on a British bill of rights has moved from being a marginalized concern of a few civil liberties campaigners to a popular reform attracting a broad consensus of support amongst politicians, the public and the judiciary. As a product of that debate, in which resistance to constitutional change played such a strong role, the Human Rights Act is, in one respect, a very restrained provision which gives priority to the need to preserve parliamentary sovereignty and respect the existing constitutional arrangements. Yet it is also an unexpectedly radical piece of legislation. By placing a duty of compliance with Convention rights on all public bodies the Act lays the foundations for the creation of a rights-based culture throughout government and the court system of the UK. Whether or not this promise is fulfilled depends ultimately on the judiciary and its willingness to take up the new role envisaged for it by the Act. The increasing receptiveness of the courts to human rights arguments and the presence of a caucus of individuals amongst the senior judges who have expressed strong support for a human rights regime suggests that the judiciary is ready to take up that challenge. Equally, the increasing experience of the higher courts in scrutinizing administrative action and their growing familiarity with European legal concepts provide the building blocks on which a strong rights-based approach can be founded.

One consequence of this change will be that judges in the UK will increasingly come to see themselves as part of an international human rights community which includes, and extends beyond, the European Court of Human Rights. As the courts come to grapple with the task of setting human rights standards they will need to draw on decisions from comparable jurisdictions around

the world. As the British judiciary joins the global community of human rights arbiters it will also come to be subject to the same public scrutiny which is being attracted by activist judges around the world. Its composition, selection criteria and method of appointment will be critically reviewed by a broader constituency than the legal establishment. In the light of the judges' expanding power some searching questions will find their way onto the political agenda: What changes are required to secure judicial independence and yet increase judicial accountability? Is the current judicial appointments process, with its secrecy and self-replication, still an acceptable way to select policy makers and guardians of our civil liberties? If not, what is to replace it? For those interested in the relationship between politics and law in Britain, the years ahead are likely to be a fascinating period of change.

kate malleson

announcement

Forthcoming *Choices* in the *Courts and Legislatures* series:

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Notes

1 Anthony Lester, "Fundamental Rights: The UK Isolated," *Public Law* (Spring 1984), p. 50.

2 Quoted in Lester, "Fundamental Rights," p. 52. The Lord Chancellor broadly fulfils the functions of the Canadian Minister of Justice. His role is, however, more extensive and complex due to the fact that he occupies a unique constitutional position, simultaneously holding key positions in all three branches of government. As well as being a member of the cabinet, he is head of the judiciary and speaker in the House of Lords, the upper legislative chamber.

3 Quoted in Lester, "Fundamental Rights," p. 54.

4 The views of the Colonial Secretary, Jim Griffths quoted in Lester, "Fundamental Rights," p. 50.

5 Lester, "Fundamental Rights," pp. 60-61.

6 "Hooding" describes the practice of covering a suspect's head during interrogation and threatening to shoot him if he refuses to answer questions.

7 See Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty* (London: Routledge, 1996).

8 See Francesca Klug, Foreword to Institute for Public Policy Research, *A British Bill of Rights*, 2nd ed. (London: IPPR, 1996), p. viii.

9 John Wadham, "Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law," *Public Law* (Spring 1997), p. 76.

10 Klug, Starmer and Weir, *A British Bill of Rights*,

11 See Klug, Foreword to Institute for Public Policy Research, *A British Bill of Rights*, p. ii.

12 Klug, Starmer and Weir, T*he Three Pillars of Liberty*.

13 Lord Lester is a senior barrister who has campaigned over many years on a wide variety of human rights issues. His peerage was granted in recognition of this work.

14 *Kaye v. Robertson* [1991] F.S.R. 62.

15 By the mid-1990s, the Law Society and the Bar Council had both publicly supported a bill of rights.

16 Klug, Starmer and Weir, *A British Bill of Rights*.

17 Liberty, *A People's Charter: Liberty's Bill of Rights* (London: Civil Liberties Trust, 1991).

18 Michael Zander, *A Bill of Rights?*, 4th ed. (London: Sweet & Maxwell, 1996), pp. 70-72.

19 Paradoxically, these were introduced by England, which extended the Convention to its dependent territories starting in Nigeria in 1959 when the Convention rights were included in the first Nigerian Constitution. (See Lester, "Fundamental Rights," p. 56.)

20 In Israel this takes the form of two Basic Laws, which set out many rights included in the European Convention on Human Rights.

21 Lord Hailsham, *Elective Dictatorship* (London: BBC Publications, 1976).

22 Richard Hodder-Williams, "Constitutional and Judicial Politics," in Andrew Adonis and Tim Hames (eds.), *A Conservative revolution?* (Manchester: Manchester University Press, 1994), p. 49.

23 Ferdinand Mount, *The British Constitution Now: Recovery or Decline?* (London: Heinemann, 1994), p. 232.

24 Lord Chancellor's Department, "Rights Brought Home: The Human Rights Bill," Consultation Paper (October 1997), p. 5.

25 J.A.G. Griffith, *The Politics of the Judiciary* (London: Fontana, 1977).

26 Fabian tract no. 390, quoted in Zander, *A Bill of Rights?*, p. 3.

27 Lester, "Fundamental Rights," p. 64.

28 Confusingly, in England these common law powers are called "judicial review." This does not describe the process of reviewing the constutitionality of legislation as in North America but the scrutiny of administrative action to determine that it is not illegal, irrational or in breach of natural justice.

29 *Ex Parte Bennett* [1994] 1 A.C. 42, p. 62.

30 See Joshua Rozenberg, *A Trial of Strength* (London: Richard Cohen Books, 1997).

31 John Griffith, *The Politics of the Judiciary*, 5th ed. (London: Fontana, 1997), p. 341.

32 *The Guardian*, December 11, 1995.

33 Robert Stevens, "Judges, Politics, Politicians and the Confusing Role of the Judiciary," in Keith Hawkins (ed.), *The Human Face of Law* (Oxford: Clarendon Press, 1997).

34 Two MORI opinion polls in 1991 and 1995 found that 79 percent of the population supported a Bill of Rights.

35 Leslie Scarman, *English Law — The New Dimension*, The Hamlyn Lecture (London: Sweet & Maxwell, 1974).

36 Lester, "Fundamental Rights," p. 63.

37 Lord Bingham "European Convention on Human Rights: Time to Incorporate," *Law Quarterly Review*, Vol. 109 (July 1995), pp. 291-392.

38 Hansard House of Lords *Debates* June 5, 1996, column 1307.

39 Lord Chancellor's Department, "Rights Brought Home."

40 Both past and future legislation must be construed consistently with the Ordinance in so far as that is possible, but only past legislation is repealed where it cannot be so construed. The rationale underpinning this model is that it upholds the principle of parliamentary sovereignty which requires that an Act cannot bind future law-making. Thus, where a later Act is inconsistent with the provisions of the Ordinance it must ultimately take precedence. (See Yash Ghai, "Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights," *The Modern Law Review*, Vol. 60, no. 4 (July 1997)). This model was favoured by Lord Lester in his last Bill introduced in 1995. See Anthony Lester, "The Mouse that Roared: The Human Rights Bill 1995," *Public Law* (Autumn 1995).

41 Lord Chancellor's Department, "Rights Brought Home," p. 8.

42 Section 4, Human Rights Act.

43 Section 10, Human Rights Act. The process allows for the appropriate government minister to amend the legislation

by order which will be subject to approval by Parliament.

44 Lord Chancellor's Department, "Rights Brought Home."

45 The right to derogate is allowed under Article 15 in times of war or other public emergency threatening the life of the nation.

46 Section 19, Human Rights Act.

47 See Klug, Foreword to the Institute for Public Policy Research, *A British Bill of Rights*, p. iv.

48 Section 6, Human Rights Act.

49 Lord Chancellor's Department, "Rights Brought Home," p. 7. A proposed amendment during the passage of the legislation, which attempted to exclude the Church from the category of a public body, failed.

50 Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act," *Public Law* (Autumn 1998); Sir Stephen Sedley, "Human Rights Act Gains Royal Assent," JUSTICE Bulletin (Autumn 1998).

51 Lord Chancellor's Department, "Rights Brought Home," p. 7.

52 *R. v. Secretary of State for the Home Department Ex parte Brind and Others* [1991] 2 W.L.R. 588.

53 Unlike the Canadian Charter of Rights, the European Convention on Human Rights does not contain a general limitation clause. Instead, equivalent clauses are built into each of the rights, with the exception of freedom from slavery or servitude (Article 4(1)) and torture, inhuman or degrading treatment or punishment (Article 3) which are unqualified rights (see Appendix).

54 Stevens, "Judges, Politics, Politicians and the Confusing Role of the Judiciary."

55 Lord Chancellor's Department, *Modernising Justice* (December 1998), para. 1.22.

56 Lord Chancellor's Department, November 16, 1998.

57 Francesca Klug and Keir Starmer, "Incorporation Through the Back Door?", *Public Law* (Summer 1997).

58 Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1997).

59 Klug and Starmer, "Incorporation Through the Back Door?"

60 Klug and Starmer, "Incorporation Through the Back Door?", p. 225.

61 See Anthony Smith, "The Human Rights Act 1998: The Constitutional Context," paper presented at a conference on The Human Rights Act and the Criminal Justice and Regulatory Process, University of Cambridge, January 1999.

62 Criminal Justice and Public Order Act 1994, Sections 34-37.

63 The European Court of Human Rights, when addressing the question of whether a breach of the Convention is "necessary in a democratic society," undertakes a two stage process. First, it considers whether the breach falls within the category of interests listed under each right. For example, in the case of Article 8, the right to privacy, these cover national security, public safety, economic well-being, prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedom of others (see appendix). These categories are so broad that few breaches are held to fall outside one or another of them. It is the second stage which is therefore the determining feature of most cases. For this, the court applies a "proportionality test" by considering whether the breach of rights was proportionate to the interest being pursued, or whether some less intrusive method could have been used to achieve the same results.

64 Lord Irvine interview in *The New Statesman*, December 6, 1996, p. 18.

65 Murray Hunt, "Human Rights: The Judge's Role," *Journal of the Judicial Studies Board*, issue 3 (1997), p. 7.

66 See Patrick Devlin, "Judges, Politics and Government," *Modern Law Review*, Vol. 41, no. 5 (September 1978), pp. 501-11.

67 Home Affairs Committee, *Judicial Appointments Procedures*, Vol. II (1996), para. 459.

68 Editorial, *Daily Telegraph*, November 29,1998.

69 "The Secret Men of Justice," *The Guardian*, July 18, 1998, p. 1; "Just Who Are These People?", *The Sun*, August 6, 1998, p. 6.

70 The House of Lords was asked to determine whether the former President of Chile enjoyed sovereign immunity from prosecution in relation to charges of torture and kidnapping during his presidency (*R v. Bartle and the Commissioner of Police for the Metropolis and Others ex Parte Pinochet*) *The Times*, November 26, 1998.

71 The court's decision, which rejected Pinochet's claims to immunity, was set aside by the Lords in January 1999 when it emerged that Lord Hoffman, one of the judges in the case, had failed to declare his links to Amnesty International, one of the organizations which had given evidence against Pinochet. This was the first time that the House of Lords had overturned one of its own decisions and led to unprecedented media criticism of the Law Lords.

72 See Lord Chancellor's Department consultation paper "Developments in Judicial Appointments Procedures" (May 1994). Also see Lord Chancellors' speeches to the Association of Women Barristers, February 11, 1998.

73 A wide range of individuals and groups backed the proposal in evidence to the House of Commons Home Affairs Committee inquiry into the judicial appointments process in 1996.

74 Kate Malleson, *The Use of Judicial Appointments Commissions: A Review of the US and Canadian Models* and Cheryl Thomas, *Judicial Appointments in Continental Europe* (London: Lord Chancellor's Department Research Series no. 6, 1997).

75 "Judges Will Face Fiercer Scrutiny," *The Times*, December 14, 1998, p. 1.

76 The level of debate about the judicial appointments process in the UK appears to be much more intense than in Canada where, although there has been ongoing criticism of the system in the years since the Charter was passed, there is no immediate likelihood of structural change.

Appendix 1: Rights and Freedoms from the European Convention on Human Rights Incorporated into the UK Human Rights Act.*

Article 2
Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his protocol of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3
Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4
Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during condtional release from such detention;
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
(d) any work or service which forms part of normal civic obligations.

Article 5
Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or

*The Act stipulates that "the Convention Rights" means the rights and fundamental freedom set out in –

(a) Articles 2 to 12 and 14 of the Convention, and

(b) Articles 1 to 3 of the First Protocol,

as read with Articles 16 to 18 of the Convention.

national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7
No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9
Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10
Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11
Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12
Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14
Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

kate malleson

Article 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Part II
The First Protocol

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Articles 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature.

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Summary

Judicial Politics in Canada: Patterns and Trends

Frederick Vaughan

Ever since the adoption of the Canadian Charter of Rights and Freedoms in 1982, the courts of Canada have become embroiled in a controversy over their proper place in the legislative scheme of things. As Justice Frank Iacobucci observed recently: "It seems that hardly a day goes by without some comment or criticism to the effect that under the Charter courts are wrongfully usurping the role of the legislatures." The purpose of this paper is twofold: a) to review, briefly, the role the courts played in the Canadian political process prior to 1982 and b) to assess the extent to which the courts have, since the Charter, usurped the role of our elected representatives by a new kind of activism in substantive areas of public policy.

It is shown, in the first instance, that the courts have always played an active role in Canada due in large measure to the federal character of our constitution. It will also be shown that the peculiar practice of referring controversial cases to the courts for "advisory opinions" has drawn the courts into contentious political issues more or less against their will.

The major part of the paper assesses the role of the Supreme Court of Canada since the adoption of the Charter. Some critics have said that "the Charter has served as a catalyst for a new era of judicial activism unparalled in Canadian history." This paper assesses that charge by focusing attention on three controversial areas of public policy where the Supreme Court has been especially active: abortion, gay rights and policing.

A British Bill of Rights: Incorporating The European Convention on Human Rights

Kate Malleson

This paper reviews the background to the incorporation of the European Convention on Human Rights into British domestic law in the Human Rights Act of 1998 and considers the possible effects of the change on the UK's legal and political system.

Despite being the first signatory to the Convention in 1951, successive British governements of the left and right remained united in their opposition to the proposal as being unnecessary and a threat to parliamentary sovereignty. Gradually the UK's poor human rights record before the European Court of Human Rights and the reduced capacity of Parliament to prevent abuse eroded this consensus. By 1998, the decision to pass the Human Rights Act was widely supported amongst judges, lawyers, politicians and the public at large.

Under the Act, which is expected to come into force in 2000, judges are required to interpret legislation in a way which is compatible with the rights set out in the European Convention. When this is not possible, the courts do not have the power to strike down legislation as unconstitutional but may declare legislation 'incompatible' with the convention. Ministers will then be expected, though not required, to take the law back to Parliament where it can be amended through a "fast track" process. Thus the formal constitutional relationship between Parliament and the judges remains unaltered. In practice, however, the need to ensure that new law is 'declaration proof' will inevitably influence policy-making and thus give the judges an indirect role in the formulation of legislation.

In addition, the Act places a wide duty on all public bodies to conform to the convention in their decision making. The role of the courts in policing that provision will change the nature of the legal system. Courts at all levels, from the lowest magistrates court to the House of Lords will need to be rights-literate. The £5 million, two-year training program being provided for judges reflects this.

The new provisions will have more impact in some areas than others. As in Canada, the field of criminal justice is likely to be most affected. Much depends on the judges. Some have expressed caution but others will not be afraid to use their new powers. Few commentators doubt that the net effect will be, in the words of the government, a radical extension of the jurisdiction of the courts in the UK.

The change has knock-on effects for the UK's constitutional and political arrangements. In particular, pressure will increase for greater openness and public scrutiny in the judicial appointments process with the increasing likelihood of establishing an independent judicial appointments commission in the near future.